(27,427)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 672.

JOHN HORSTMANN COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 11, 1920.

1 In the Court of Claims of the United States.

No. 32004.

JOHN HORSTMANN COMPANY (a Corporation), Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

I. *Petition.*

Filed January 6, 1913.

To the Chief Justice and the Associate Justices of the Court of Claims:

The petition of John Horstmann Company respectfully shows:

I.

That it is, and during all the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That petitioner is now, and was at all the times herein mentioned, the owner in fee simple, absolute and in possession, and entitled to the possession of that certain real property situate, lying and
2 being in the County of Churchill, State of Nevada, and particularly described as follows, to wit:

All of the Northeast quarter of Section 18, in Township 19 North Range 28, East, M. D. B. & M., according to the official plat of the survey of public lands made by the United States Surveyor General for the District of Nevada.

III.

That there was located on a portion of said lands of your petitioner, above described, and within the cone of an extinct volcanic crater, as hereinafter set forth, a small lake covering several acres, commonly known as and called "Little Soda Lake," also owned by your petitioner, which normally is nearly dry, except in small depressions as hereinafter more fully described; that said "Little Soda Lake" is within that certain district or area in the said State of Nevada called the "Fallon Area of the Carson-Truckee Irrigation Project," now in course of construction and about completed by the United States Government; that said "Little Soda Lake" lies in the extinct volcanic crater through which scoriated lava, cinders, flowing mud and ashes were ejected during its active state, forming a cone

upon a nearly level plane, as shown by line A B C on the profile attached hereto, marked Exhibit "A," and made a part hereof. This is part of what is generally termed the bed of Lake Lahonton. This cone, which forms the basin or sink of "Little Soda Lake" as
3 well as "Big Soda Lake" which adjoins it, extends approximately four miles in length by two and one-half miles in width, as shown by line marked "Limit of Soda Lake Sand" as shown upon the map attached hereto, marked Exhibit "B," and made a part hereof; that the area embraced within the said cone is covered more or less by basalt or lava, the particles of which vary in size from four to six or eight inches in diameter to very fine sand at the outer rim of said cone; that said particles or fragments of basalt or lava decrease in size from the center of the said cone as they near the outer rim thereof until at the rim they consist of very fine sand, and this sand is constantly drifting about with the winds.

IV.

The bed of said Lake Lahonton is more or less sedimentary and lies in nearly parallel seams or strata of clay and sand through and along which the water from the irrigation canals and ditches, as hereinafter set forth, percolates and seeps and eventually finds its way to the lowest point, serving as an outlet to the said seams or strata of clay and sand, which said lowest point is the said "Little Soda Lake."

V.

That the soil in and about said "Little Soda Lake" and generally in and about that vicinity, is exceedingly porous and dry; that the normal annual rainfall in and about said district is slight, the
4 mean annual precipitation amounting to about five inches, which is quite uniformly distributed over that period; that the rainfall in and about said area since the year 1905 down to the present time is and has been normal.

VI.

That the said "Little Soda Lake" is normally, and has been until the time and for the reasons hereinafter mentioned, a nearly dry stretch of land containing water only in small depressions; the water in one of such depressions being very saline, due to an alkali spring which arises in said depression. The water from this spring has a density which formerly and prior to the time and for the reasons hereinafter mentioned varied from 11 to 14 degrees Beaume, caused by the presence of salts therein; that during each year prior and up to the time and for the reasons hereinafter set forth, the water was pumped from said depressions where said spring arises, by your petitioner, into dry depressions or vats surrounding the said "Little Soda Lake" on the margin thereof, and was there evaporated by natural processes, leaving a thick and valuable deposit of impure sodium carbonate, which was then gathered by your petitioner.

VII.

That your petitioner acquired said real property above described in the year 1888, and has been ever since said time up to the time and for the reasons hereinafter mentioned, engaged in the commercial gathering and selling of sodium carbonate each year, after the water has evaporated from said vats or depressions surrounding said lake as above set forth, by means of scraping the same from the bottom of said vats or depressions.

VIII.

That your petitioner has at all times after the acquisition of said "Little Soda Lake" down to the time it was prevented from so doing, as hereinafter set forth, derived a large revenue and profit from the production and sale of said sodium carbonate, the amount of which annual income has been on the average during the past twenty years, the sum of $1732.00 net over and above all expenses and costs.

IX.

That your petitioner has expended large sums of money, to wit, the sum of $5000.00, in installing and building vats, sheds and other necessary facilities for the gathering and handling of said sodium carbonate.

X.

That said "Little Soda Lake" is valuable only and solely as a source of supply of said sodium carbonate and your petitioner purchased said property solely for that purpose, and at all times since it acquired the same it has used it solely for that purpose.

XI.

That the said United States Government, by lawful authority through the Department of Interior and the Reclamation Service, in carrying out and in furtherance of, and while acting under the various acts of Congress of the United States for the irrigation and reclamation of arid lands in the United States, and particularly in the State of Nevada, did heretofore commence the building and construction of what is generally known as and called the "Carson-Truckee Irrigation Project" in the said State of Nevada; that in carrying out and as a part of said scheme of irrigation and reclamation of said arid lands in said State of Nevada, said United States Government, acting by and through said Departments of said Government, and the proper officers thereof, did build ditches, canals, flumes, aqueducts, pipes, gates, dams, and other useful and necessary appurtenances in said State of Nevada for the purpose of conducting, carrying and transporting water for the irrigation of said arid lands; that water is now and has been since the same was turned on in said ditches and canals, carried through said ditches and canals, flumes, aqueducts and pipes, and said irrigation system is now, and

has been, in so far at least as it affects the land of your petitioner, in full operation since about the month of December, 1906; that the irrigation season of said project in said State of Nevada, petitioner is informed and believes, lasts each year from about March
7 until October; that certain of said canals and ditches built as aforesaid by the United States Government, pass through, across and over lands adjacent to the said "Little Soda Lake" and surround it on all sides at a distance of about one mile therefrom, as will appear in said Exhibit "B" hereto attached.

XII.

That none of said canals and ditches of said irrigation project for carrying, and which did carry said water, as aforesaid, and which surround said "Little Soda Lake," are lined by brick, cement, or other substance or material, but were made or constructed by merely digging out the earth, thereby forming a canal or ditch in the earth; that the water as it flows through the said canals or ditches seeps and percolates through the sides and bottom of said canals and ditches and through the adjoining soil to and into the said "Little Soda Lake," as the said "Little Soda Lake" is the lowest point and the point to which water would naturally flow underground from said canals and ditches by reason of the character of the seams or strata of the soil lying between the said canals and ditches and said "Little Soda Lake."

XIII.

That said United States Government and said departments and officers thereof, in carrying out said irrigation project as
8 aforesaid, have brought into and continue each year to bring into said Fallon Area of said Project by and through its canals and ditches, large volumes of water from a great distance, to wit, from the Truckee River; that the said water was and is brought from outside of the watershed of the said Carson River, and particularly from outside of said Fallon Area of said Project, the result of which has been to add an amount of water annually to said Fallon Area largely in excess of the amount that is normally and was formerly brought into or contained in said area.

XIV.

That about the month of November or December, 1906, the exact time of which your petitioner does not know, and is therefore unable to state, the water was turned on in said canals and ditches surrounding the said "Little Soda Lake" by the United States Government acting through said departments and its proper officers thereof; that owing to the said porous condition of the soil in said canals and ditches, and generally in that vicinity as aforesaid, and the lack of proper lining in said canals and ditches, and owing to the way said canals and ditches were built, and also to the natural condition existing as aforesaid, by reason of which water would flow from said

canals and ditches to and into said "Little Soda Lake," the said water was permitted by the said United States Government
9 and the said departments and officers thereof, to and did seep and percolate through the said canals and ditches and through the seams or strata of clay and sand underlying the same into and on the said "Little Soda Lake."

XV.

That immediately after the said water was turned into the said canals and ditches by said United States Government acting through said departments and officers thereof, the water therefrom commenced to and did percolate and seep through the said canals and ditches surrounding said "Little Soda Lake," and through the said seams or strata of earth leading therefrom to said "Little Soda Lake," and ever since has and does now continue to percolate and seep from the said canals and ditches into and on said "Little Soda Lake;" that the underground flow of water from said canals and ditches into said "Little Soda Lake" was not perceptible until some time in the early part of the year 1907, that is, about March of said year, when the water seeping and percolating from said canals and ditches was first noticed by your petitioner, but it was not then known or supposed by your petitioner, or was your petitioner in any way advised that such flow of water into said "Little Soda Lake" was caused by the seepage and percolation from said canals and ditches; that your petitioner was not then nor until some time afterwards aware of the fact that such underground flow of water
10 came from said canals and ditches; that no change in the condition of said "Little Soda Lake" was effected or caused until in the year 1907; that your petitioner at all of the times since the water was turned on in said canals and ditches kept and maintained an agent at said "Little Soda Lake" whose duty it was and who did report all matters and things concerning said "Little Soda Lake" to your petitioner; that from the year 1907 when the water was first noticed to be coming into said "Little Soda Lake" from said canals and ditches in the manner aforesaid, the same continued in said manner thereafter to come into said "Little Soda Lake" until the year 1908, when the said "Little Soda Lake" belonging to your petitioner did become and was wholly submerged, taken and appropriated by said United States Government, and thereby rendered unfit for the uses and purposes aforesaid and of no practical value whatever; that at the same time the said "Little Soda Lake" was so submerged, taken and appropriated, the said vats, sheds and other necessary facilities for gathering and handling said sodium carbonate were also taken and appropriated by said United States Government, and also thereby rendered unfit for the uses and purposes aforesaid and of no practical value whatever, solely by reason of the seeping and percolating of water into and on said "Little Soda Lake" as aforesaid; that the water from said canals and ditches has ever since the year 1907 continued to percolate and seep in the
11 manner aforesaid, into and on said "Little Soda Lake," and is now seeping and percolating into and on said "Little Soda

Lake," and will eventually entirely fill up said "Little Soda Lake" Basin.

XVI.

That solely by reason of the turning on and running of waters in said canals and ditches, and by reason of the said irrigation project, and acts and things aforementioned, the said "Little Soda Lake" and the said vats, sheds, and other necessary facilities for gathering and handling sodium carbonate have been taken by said United States Government and said departments and officers, from your petitioner; and your petitioner since the year 1908 has been compelled to give up the gathering, handling and selling of said sodium carbonate from said "Little Soda Lake."

XVII.

That by reason of the foregoing your petitioner has a claim against the United States under an implied contract, for compensation for the value of property taken by the United States for a public use under the power of eminent domain under the Constitution of the United States and by authority of the Acts of Congress, duly empowering its officers and agents thereto in that behalf as aforesaid.

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XVIII.

That your petitioner wrote several letters to the Department of the Interior of the United States Government about two or three years prior to the present time, but the said department did disclaim and at all times has disclaimed any responsibility on the part of the United States Government for the said acts and things alleged herein, for the reason as such department claims, that the flow of water into and upon said "Little Soda Lake" was due to causes other than the flow of water into said canals and ditches surrounding your petitioner's lands; that your petitioner is the sole owner of said land and said "Little Soda Lake," and the only person interested in said lands or in this claim, or in any amount which may be recovered from the United States; that no assignment or transfer of said claim, or any part thereof, or any interest therein has been made; that your petitioner is justly entitled to the amount herein claimed from the United States; that there are no credits or offsets to said claim; that claimant, your petitioner, has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said United States Government and that your petitioner believes all the facts stated in this petition to be true.

Wherefore, your petitioner prays that it have and recover from the said United States Government the sum of thirty-five
13 thousand dollars ($35,000), the same being the value of the said "Little Soda Lake" and the vats, sheds and other prop-

erty of your petitioner taken and appropriated by said United States Government.

And your petitioner will ever pray.

JOHN HORSTMANN COMPANY,
By JOHN HORSTMANN,
[CORPORATE SEAL.] *President.*
J. A. BERNHARD,
Secretary.

T. T. C. GREGORY,
THOMAS A. ALLAN,
San Francisco, California,
Attorneys for Petitioner.
EDWARD M. CLEARY,
Warder Building, Washington, D. C.,
Of Counsel.

14 STATE OF CALIFORNIA,
City and County of San Francisco, ss:

J. A. Bernhard, being first duly sworn, deposes and says: That he is an officer, to wit, the secretary of John Horstmann Company, a corporation; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief, and as to those matters, that he believes it to be true.

That he makes this affidavit on behalf of John Horstmann Company, a corporation, for the reason that said facts are peculiarly within his knowledge, and for the further reason that said corporation cannot make an affidavit.

J. A. BERNHARD.

Subscribed and sworn to before me this 18th day of December, 1912.

[NOTARIAL SEAL.] A. K. DAGGETT,
Notary Public in and for the City and County of San Francisco, State of California.

15 II. *History of Proceedings.*

On March 21, 1913 the defendants filed a demurrer to the claimant's petition.

On May 26, 1913 the demurrer was argued and submitted by Mr. S. S. Ashbaugh, for the defendants, and by Mr. F. S. Bright, for the claimant.

On June 2, 1913, the demurrer was overruled by the court with an opinion by Barney, J.

III. *Argument and Submission of Case.*

On March 10, 1919 the case was argued by Messrs. Edward M. Cleary, Frank S. Bright and Stanley Hinrichs, for the claimant,

and by Mr. Karl E. Steinhauer, for defendants, in connection with the case of The Natron Soda Company, No. 32,453, and submitted.

16 IV. *Findings of Fact and Conclusion of Law.*

Entered April 7, 1919.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation, duly organized and existing under the laws of the State of California, and its predecessors in interest were at the times herein mentioned the owners of certain lands in Churchill County, State of Nevada, surrounding and including a lake known as Little Soda Lake, which it owned in fee simple to wit: the North East Quarter of section 18, Township 19, North Range 19, East D. B. & M.

II.

Prior to and during the year 1906 the said lake and the lands surrounding it were in the actual possession of the plaintiff and its predecessors, who were manufacturing soda from the waters of said lake; this soda was marketed by the plaintiff, and this product so manufactured and marketed made the lake aforesaid valuable to the plaintiff.

A plant for the recovery of the mineral contents of the waters of Little Soda Lake had been constructed many years prior to the acquisition of the property by the plaintiff, and had been improved and added to by it, and was in full operation in the year 1906. Little Soda Lake was a dry lake bed with now and then water standing in pools forming sump holes which was pumped into earth vats along the edge of the lake and then manufactured into soda.

III.

Little Soda Lake is situated in an area known as the Carson Sink Valley, a depression in the earth's surface covering many thousand acres, which was during a past geologic age the bottom of an
17 inland sea, now called Lake Lahontan. The slope of said depression in the neighborhood of Little Soda Lake is in a general northeasterly direction with a grade of about ten feet to the mile. The detail of the topography within this depression has been modified by the elements since the desiccation of Lake Lahontan. These modifications consist of surficial deposits of sand, clay, silt, cinders, and other forms of disintegrated rock substance, and some of them have in some places solidified into stone or become consolidated into compact and impervious areas of various sizes and shapes called playas. Fissures and cracks exist throughout the mass, the

occurrence of these various features or constituents not being uniform. The lowest depressions on the earth's surface within this area are the Big and Little Soda Lakes and the Carson River. Prior to the year 1907 the surface of the Little Soda Lake was about 3,935 feet above sea level. The Carson River approaches within two miles of said lake, at which point its altitude is about 4,000 feet, and it flows in a general easterly direction until it reaches a point near the town of Fallon, at which it turns and runs in a general northerly direction.

IV.

The Little Soda Lake is the result of accumulations of water in a volcanic crater drawn from the general body of underground waters in the valley. This crater forms an inverted conical depression in the floor of said Lake Lahontan, with a rim rising from 80 to 100 feet above the floor of the present valley and with deep converging inner walls.

V.

The seasonal rainfall upon the valley floor averages about four inches, and is practically negligible as a source of ground-water replenishment. The bottom of said lake was below the level of the water table, and the only known source of water supply was the small springs which seeped into the lake. These springs were supplied by seepage from the Carson River.

Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move underground. The slope of the Carson Valley is in a northeasterly direction.

VI.

From prior to 1867 to 1906 the level of Little Soda Lake had not varied more than 2 feet.

VII.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson Project, consisting of dams, canals, and other structures whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906 and during each year since then transported to the watershed of the Carson River. This water, together with surface waters entering the Carson River from its own watershed, were by this irrigation project conserved, con-
18 trolled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T line canal, U line canal and N line canal and Truckee canal with their laterals. Each of said canals passes within two miles of Little Soda Lake except the Truckee

canal, and in the neighborhood of the lake their altitude is about 100 feet higher than the lake and about 40 feet higher than Carson River. This irrigation system transports large amounts of water through each of said units during the irrigation season of each year, which includes the months of April to September, inclusive, and stores large quantities of water in said Lahontan Dam during every month of each year.

VIII.

With the advent of the Truckee-Carson irrigation project the body of ground water in the entire section covered by the project rose; the volume of water in Little Soda Lake has continually increased, and the level of said lake has risen about nineteen vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated, and the value of the property of the plaintiff has been destroyed.

IX.

From the time the Truckee-Carson Canal project was completed, in 1906, to the year 1915 over 26,000 acres of additional land had been subjected to irrigation under the project, there having been 14,000 acres under irrigation theretofore. In its ultimate development the project contemplates the reclamation of 206,000 acres of land. The canals of the project ramify an area of close to 300,000 acres.

X.

No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals of the project.

XI.

The value of the property of the plaintiff which has been destroyed is $9,000.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and therefore orders that the petition be, and the same is hereby, dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the chief clerk and collected by him according to law.

19 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventh day of April, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the John Horstmann Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the defendants, the United States; and that the petition herein be and it hereby is dismissed: And it is further ordered, adjudged, and decreed that the defendants, the United States, shall have and recover of and from the claimant, the John Horstmann Company, as aforesaid, the sum of Eight Hundred and Eighty-four Dollars and forty-six cents ($884.45), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VI. *Proceedings After Entry of Judgment.*

On June 3, 1919 the claimant filed a motion for new trial and for amendment of findings of fact. On October 20, 1919 said motion was overruled by the court.

VII. *Claimant's Application for, and Allowance of, an Appeal.*

Claimant hereby prays an appeal to the Supreme Court of the United States from a judgment of this Court rendered on the 20th day of October, A. D., 1919, reaffirming a judgment rendered on the 7th day of April, A. D., 1919, by which the petition was dismissed.

EDW. M. CLEARY,
Attorney for Claimant.

Filed Jan. 9, 1920.

Ordered: That said appeal be allowed as prayed for.

BY THE COURT.

Jan. 9, 1920.

20 Court of Claims.

No. 32,004.

JOHN HORSTMANN COMPANY (a Corporation),

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law entered

by the court; of the judgment of the court; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court at Washington City this January 14, 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

Endorsed on cover: File No. 27,427. Court of Claims. Term No. 672. John Horstmann Company, appellant, vs. The United States. Filed January 14th, 1920. File No. 27,427.

CLERK'S COPY.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 321

NATRON SODA COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 12, 1922.

(27,475)

(27,475)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 720.

NATRON SODA COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 4, 1920.

1 In the United States Court of Claims.

No. 32453.

NATRON SODA COMPANY, a Corporation, Claimant,

vs.

THE UNITED STATES, Defendant.

I. *Petition and Exhibit* 1.

Filed April 16, 1913.

The petition of claimant respectfully shows to the Court:

1. That it is a corporation created and existing under the laws of the State of California, with its principal office in the city and County of San Francisco in said State, and a branch office in Washoe County in the State of Nevada.

2. That your petitioner has a claim against the United States of America under the implied contract for compensation for the value of property taken by the United States for public use, as hereinafter stated and alleged.

2 3. That the said claimant is now and was at all the times herein complained of the sole owner of certain mining claims located under the mining laws of the United States by the claimant's predecessors in interest upon then otherwise vacant and unappropriated public lands of the United States after the discovery on each of said claims by said locators, who were then and there citizens of the United States, of valuable mineral, to-wit, soda, in commercial quantities. That the said locators and the claimant as their successor in interest in said claims have been at all times since their location, in the sole and exclusive possession thereof and have performed more than $500 worth of work on each of said claims. A description of these claims together with a statement of the locators thereof is hereunto attached, marked "Claimant's Exhibit No. 1."

4. That at the time said lands were acquired by claimant and its grantors a portion of them were *were* covered by Big Soda Lake in said Churchill County, Nevada, which said Lake is located on what is known to the United States Geological Survey as the bed of Lake Lahontan, which Lake is in a volcanic depression about seventy-five feet below the level of the surrounding country. That the waters of said Lake were very strongly impregnated with soda and that in said region the annual rainfall is about 4.4 inches.

5. That prior to the year 1906 claimant had constructed on the margin of said Lake about twenty acres of vats at a cost of about

3 $40,000, into which said vats the Lake water was directed and after the water in these vats had evaporated, soda crystals were precipitated, so that as a result of claimant's operations it recovered each year for many years about 500 tons of soda which it sold at a profit of $10 a ton over and above the cost of production. That in addition to said vats, claimant prior to said year 1906 had bought and erected upon the shore of said Lake a carbonating furnace costing about $13,000, and a reverberating furnace costing about $3,000, and in addition thereto had expended a large sum of money in buildings and other equipment for the conduct of its business of recovering soda from the waters of its said Lake. That in the year 1906 claimant was ready to produce in addition to the form of soda which it was then producing, bath crystals at a very low cost, from which its profits would have been more than $5,000 a year, and that claimant's total investment in said equipment was about $70,000. That said Lake and the land surrounding said Lake owned by claimant, were prior to the year 1906 of the value $50,000.

6. That in the year 1904 the Reclamation Service of the United States, under provision of law of the United States, commenced the building of canals to float water from the Truckee River twenty miles into the Carson River for irrigation of the so-called Fallon Area in said Churchill County in the said State of Nevada, said work being carried on under the designation of the Truckee-Carson Irrigation Project, and in the year 1906 the United States turned water into these canals.

4 7. That for several years continuously, and now continuously, the said Government of the United States of America, in the exercise of its power of eminent domain under the Constitution of the United States, and by authority of the acts of Congress duly empowering its officers and agents thereto in that case made and provided, did construct, build and maintain, and continuously since has been constructing, building and maintaining, and are now constructing, building, maintaining and carrying water in certain canals in furtherance of certain reclamation projects in a certain area known as the Fallon Area by said Reclamation Service, said canals practically surrounding the said Big Soda Lake, the property of your said petitioner, and by reason of seepage of said water from said canals through the clay and sand strata composing the soil in the intervening space, have caused the water in said Lake to rise to so high a level as to submerge, overwhelm and appropriate the plant and equipment installed at great expense by your petitioner for the purpose of taking, preparing and marketing the said soda in its various forms as herein described, thereby rendering it impossible for it to engage in said business, for which purpose and no other your petitioner acquired title to the said tracts of land and built and installed said plant and equipment, which are fixtures and immovable.

8. That in the year 1907 claimant discovered that there was a much greater rise in the waters of the Lake than normally occurred, and measurements were commenced which showed that this rise was due to other causes than the normal rainfall per annum.

5 9. That immediately the Secretary of the Interior was notified of this condition and that claimant believed it to be due to seepage from said above described canals, built as aforesaid by the United States, and that during the said year such a large amount of water came into said Lake from said canals that evaporation did not bring the water of the Lake which was brought into the vats during said year up to a crystallizing point. That during the years 1907 and 1908 said claimant spent much money in raising its levees and endeavoring to overcome said seepage but it continued and the depth of the Lake not being reduced by evaporation as had occurred for all the years known to man prior to 1907, has grown greater and the waters have risen until since the year 1907 said vats and the other property hereinbefore described, owned by claimant, have been completely flooded by the seepage from said canals and in this way have been appropriated by the United States, without any compensation to claimant. That in addition to appropriating said property of claimant, the United States has by reason of its construction and use of said canals so raised the waters of said Lake which contained a very large tonnage of carbonate of soda and of salts available for bath crystals as to prevent claimant from carrying on its business of extracting and obtaining the same, and in this way has appropriated the waters of said Lake and made it impossible for said claimant to use them for the purpose for which it purchased them, (and has damaged claimant in this way the sum of $100,000.) That the soil around said Big Soda Lake and generally in the vicinity is largely sand and clay of a character subject to seepage of the water from said canals. That in the area described since the year 1905 down to the present time the
6 annual rainfall has been normal.

10. That claimant and its grantors acquired this property in the year 1879, and between the years 1880 and 1907 had taken each year as the result of the evaporation hereinbefore described sesqui carbonate of soda which was precipitated in said vats and when this had occurred the mother liquor was pumped into the lake and the year's crop taken up by your petitioner; but that since said year 1907 your petitioner has never been able to make a crop of said soda because of the rise of said water, and further because its plant for the evaporation and preparation of said soda has been taken possession of by the United States, through its being submerged by the water from said canals. That said land and said Lake are valuable for no other purpose and were purchased by claimant for the purpose only of securing from them the carbonate of soda.

11. And your petitioner further shows that the said acts of the Government of the United States, in constructing, building and maintaining said canals, as aforesaid, have been done and are being done lawfully by the officers and agents of the United States in the exercise of its powers of eminent domain under the Constitution of the United States and the laws of Congress, for the public purpose of reclaiming and rendering cultivable said Fallon area for a public use, purpose and benefit.

12. Your petitioner further alleges and shows that by reason of the premises there is due and owing to the petitioner by the
7 United States, for and in consideration of the facts hereinbefore alleged and the appropriation and taking of the said lands, waters of said Lake and said plant and equipment and for the profits which claimant could have derived from the business of said petitioner, through the said operations of the Reclamation Service for a public use and purpose, in the manner and form heretofore alleged, the sum of $170,000, the value of the lawful compensation for such property so taken and the profits that should have been so derived, as aforesaid.

The premises considered, claimant prays for judgment against the defendant in the sum of One Hundred and Seventy Thousand Dollars.

THE NATRON SODA COMPANY,
By E. GRISWOLD,
President.

CLARENCE E. DAWSON,
Attorney for Claimant.
F. S. BRIGHT,
Of Counsel.

8 STATE OF CALIFORNIA,
County of Alameda, ss:

E. Griswold, being sworn, says that he is the President of The Natron Soda Company, claimant in the above entitled petition by him subscribed as President; that he has read said petition and knows the contents thereof, and that the statements therein made are true to the best of his information and belief.

E. GRISWOLD,
President, The Natron Soda Company.

Subscribed and sworn to before me this 7th day of April, 1913.
W. E. RODE,
Notary Public.

"CLAIMANT'S EXHIBIT No. 1."

Description of Land Claims to which Petitioner is Entitled to Patent.

That certain real property commonly known and called The Big Soda Lake property, consisting of the Big Soda Lake, and including those certain pieces, parcels and tracts of land, and of land under water, and the mineral and valuable properties of the water covering said land, and the mineral and valuable properties and deposits in such land, situate, lying and being in the County of Churchill, in the State of Nevada, and described as follows, to-wit:

9 1. Those certain parcels of placer or mining ground located by C. W. Browning, W. D. Epperson, J. O. Traynor, J. Page, Jos. Smith, John Halloway, M. V. Gilbert and John Lee,

commencing at a stake of the meandered line of what is known by the name of "Soda Lake North," near the North East corner of the South East quarter of the South West quarter of section seven (7) in township nineteen (19) North Range Twenty-eight (28) East of Mount Diablo base and meridian; thence running North to the North East corner of the South West quarter of section seven (7) aforesaid; thence East ten chains; then North ten chains; thence East ten chains; thence North to the South East corner of the North East quarter of the North East quarter of section seven (7) aforesaid; thence East to the section line between sections 7 and 8 in said township; thence North on said section line to the place where it cuts the meandered line of said Lake; thence East and South on the meandered line as reported by the United States Surveys to the South West corner of the South East quarter of the North West quarter of section eight (8); thence West to the South West corner of the South East quarter of the section seven (7) aforesaid; thence South to the place where the line will cut the meandered line of the said Lake according to the United States Surveys; thence West on the meandered line to the place of beginning, containing one hundred and fifty-six and 86/100 acres of land, more or less.

2. Those certain parcels of placer mining ground located
10 by Jas. W. Richards, Thomas A. Fagan, D. W. Bushnell, B. F. Gray, J. B. Gray, James Fagan, W. C. Dillard and D. H. Dillard, beginning at a stake of the meandered line of said Soda Lake North, near the North East corner of the South East quarter of the South West quarter of section seven (7) in township 19 North of Range 28 East; thence North to the North East corner of the South West quarter of said section seven (7); thence East ten chains; thence North ten chains; thence East ten chains; thence North to the South East corner of the North West quarter of the North East quarter of section seven (7); thence East to the section line between section 7, and thence North on the section line to a stake where said section line intersects the meandered line of the Lake aforesaid; thence on the meandered line West and South according to the United States Surveys to the place of beginning, containing one hundred and forty-eight and 70/100 acres of land, be the same more or less.

3. All of those certain parcels of placer mining ground located by Geo. Stone, Wm. H. Troop, Wm. Troop, George C. Troop and Oscar Troop, and deeded to said Geo. W. Stone by said Wm. H. Troop, George C. Troop and Oscar Troop, described and bounded as follows, to wit: Beginning at the first stake of the meandered line of Soda Lake North, aforesaid, West of the Willow Spring, said spring being located on the South side of said Lake near the section line between sections 7 and 8 in township aforesaid between the
11 East and West half of the South East quarter of section 7 aforesaid, to the North East corner of the North West quarter of said section seven; thence East on the division line between the South half and the North half of section seven (7), and on the same line through to section eight (8) to the place where the line will intersect the meandered line of the said Lake; thence South and

South West on the meandered line according to the United States Surveys back to the place of beginning, all in said Township 19 North, Range 26 East, containing ninety-seven and 28/100 acres, be the same more or less;

Also Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), and Twelve (12), and the North East quarter of the North West quarter of section seven in Township 10 North of Range 28 East, Mount Diablo Base and Meridian, containing four hundred and two and 84/100 acres, more or less;

Also the West half of section eight, as outside of the meandered line of the aforesaid Soda Lake, Township 19 North, of Range 28 East, M. D. B. & M., all in Churchill County, Nevada.

12 II. *History of Proceedings.*

On May 26, 1913, the defendants filed a demurrer to claimant's petition.

On the same day the demurrer was submitted.

On June 2, 1913, the court filed an order overruling the demurrer.

III. *Amendment of Petition Filed by Leave of Court Feb.* 17, 1919.

Comes now the claimant, by its attorneys, and leave of the Court having been first obtained, amends the petition filed in the above-entitled cause by adding to paragraph number twelve thereof the following sentence:

That no assignment or transfer of your petitioner's claim or any part thereof or interest therein has been made; that your petitioner is justly entitled to the amount herein claimed after allowing all just claims, credits and offsets; that your petitioner has at all times borne true allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the Government of the United States; and that he believes the facts stated in this petition to be true:

F. S. BRIGHT,
H. STANLEY HINRICHS,
Attorneys for Claimant.

DISTRICT OF COLUMBIA, *ss:*

H. Stanley Hinrichs, being sworn, says that he is counsel for the claimant in the above-entitled cause, that he has read the above amendment of petition and knows the contents thereof, and that the statements made therein are true to the best of his knowledge, information and belief.

H. STANLEY HINRICHS.

Subscribed and sworn to before me this 16th of January, 1919.

[SEAL.] JOHN F. A. BECKER,
Notary Public, District of Columbia.

13 IV. *History of Further Proceedings.*

On March 10, 1919, the case was argued and submitted on merits by Mr. Frank S. Bright and Mr. H. Stanley Hinrichs, for claimant, and by Mr. K. E. Steinhauer, for defendants, in connection with the case of John Horstmann Company, No. 32,004.

On April 7, 1919, the court filed findings of fact and conclusion of law and entered judgment in favor of the defendants in the sum of $884.46 and dismissed claimant's petition, with an opinion by Hay, J.

On June 4, 1919, the claimant filed a motion for a new trial and for amendment of findings.

On October 20, 1919, the court entered an order overruling claimant's motion for new trial; allowing in part and overruling in part the claimant's motion to amend findings. Former findings of fact vacated, set aside and withdrawn and new findings this day filed. Former judgment and opinion to stand.

V. *Findings of Fact (as Amended), Conclusion of Law, and Opinion by Hay, J., Entered October 20, 1919.*

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff is a corporation, duly organized and existing under the laws of the State of California, and it and its predecessors in interest were at the time mentioned herein the owners of certain lands in Churchill County, State of Nevada, surrounding and including a lake known as Big Soda Lake, which it owned in fee simple to wit: Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12, and the northeast quarter of northwest quarter of section 7, and also the west half of section 8, all in township 19 north, of range 28 east, Mount Diablo base and meridian.

14 II.

Prior to and during the year 1906 the said lake and the lands surrounding it were in the actual possession of the plaintiff and its predecessors, who were manufacturing soda from the waters of said lake. This soda was marketed by the plaintiff, and this product so manufactured and marketed made the lake aforesaid valuable to the plaintiff.

A plant for the recovery of the mineral contents of the waters of Big Soda Lake had been constructed many years prior to the acquisition of the property by the plaintiffs, and had been improved and added to by it, and was in full operation in the year 1906.

III.

Big Soda Lake is situated in an area known as the Carson Sink Valley (a depression in the earth's surface covering many thousand acres), which was, during a past geologic age, the bottom of an inland sea, now called Lake Lahontan. The slope of said depression in the neighborhood of Big Soda Lake is in a general northeasterly direction with a grade of about 10 feet to the mile. The detail of the topography within this depression has been modified by the elements since the desiccation of Lake Lahontan. These modifications consist of surficial deposits of sand, clay, silt, cinders, and other forms of disintegrated rock substance, and some of them have in some places solidified into stone or become consolidated into compact and impervious areas of various sizes and shapes called playas. Fissures and cracks exist throughout the mass, the occurrence of these various features or constituents not being uniform. The lowest depressions in the earth's surface within this area are the Big and Little Soda Lakes and the Carson River. Prior to the year 1907 the surface of the Big Soda Lake was about 3,935 feet above sea level. The Carson River approaches within two miles of said lake, at which point its altitude is about 4,000 feet, and it flows in a general easterly direction until it reaches a point near the town of Fallon, at which it turns and runs in a general northerly direction.

IV.

The Big Soda Lake is the result of accumulations of water in a volcanic crater drawn from the general body of underground waters in the valley. This crater forms an inverted conical depression in the floor of said Lake Lahontan, with a rim rising from 80 to 100 feet above the floor of the present valley and with deep converging inner walls.

V.

The seasonal rainfall upon the valley floor averages about 4 inches, and is practically negligible as a source of ground water replenishment. The bottom of said lake was below the level of the water table, and the only known source of water supply was the small springs which seeped into the lake. These springs were supplied by seepage from the Carson River.

Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move underground. The slope of the Carson Valley is in a northeasterly direction.

VI.

From prior to 1867 to 1906 the level of Big Soda Lake had not raised more than 2 feet.

15

VII.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson project, consisting of dams, canals, and other structures, whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906 and during each year since then transported to the watershed of the Carson River. This water, together with surface waters entering the Carson River from its own watershed, were by this irrigation project conserved, controlled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T-line canal, U-line canal, and N-line canal, and Truckee Canal, with their laterals. Each of said canals passes within two miles of Big Soda Lake except the Truckee Canal, and in the neighborhood of the lake their altitude is about 100 feet higher than the lake, and about 40 feet higher than Carson River. This irrigation system transports large amounts of water through each of said units during the irrigation season of each year, which includes the months of April to September, inclusive, and stores large quantities of water in said Lahontan Dam during every month of each year.

VIII.

With the advent of the Truckee-Carson project, the body of ground water in the entire section covered by the project rose; the volume of water in Big Soda Lake has continually increased, and the level of said lake has risen about 19 vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated, and the value of the property of the plaintiff has been destroyed.

IX.

The plaintiff's predecessors in interest conveyed to the United States of America a right of way over 3,133.9 feet of the lands of the plaintiff in the northeast quarter of northwest quarter of said section 7, for the construction of the Truckee-Carson project. Said conveyance recites that it was made in consideration of $1. A prior contract in writing between plaintiff's predecessor in interest and the United States, in which it was agreed that said right of way would be granted to the United States, contained the following provisions:

"The first party, in consideration of the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described, agrees that the second

party may enter on, survey for, grade, and construct, canals or ditches upon or across the lands of the first party."

"It is further agreed that in consideration of the premises, the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works."

The deed made in pursuance of said contract contained neither of the provisions quoted above.

X.

From the time the Truckee-Carson canal project was completed in 1906 to the year 1915 over 26,000 acres of additional land had been subjected to irrigation under the project, there having been 14,000 acres under irrigation theretofore. In its ultimate development the project contemplates the reclamation of 206,000 acres of land. The canals of the project ramify an area of close to 100,000 acres.

16 XI.

No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals of the project.

XII.

The value of the property of the plaintiff which has been destroyed is $45,000.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the plaintiff is not entitled to recover, and that its petition ought to be, and it is hereby, dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the chief clerk and collected by him in the manner prescribed by law.

Opinion.

HAY, *Judge,* delivered the opinion of the court:

This is a suit brought by the plaintiff (the Natron Soda Company) against the United States for the alleged taking of its property, a so-called soda lake situate in the State of Nevada. This lake, known as Big Soda Lake, had been in the possession of the plaintiff and its predecessors in interest for a number of years prior to the year 1906. From the waters of this lake the plaintiff manufactured and marketed a carbonate of soda, a valuable product; and the plaintiff had constructed and maintained a plant for the recovery of this soda from the waters of this lake. This plant was in full operation in the year 1906.

Big Soda Lake is situated in an area known as the Carson Sink

Valley, a depression in the earth's surface covering many thousand acres of land, which was during a past geologic age the bottom of an inland sea, now called Lake Lahontan. The slope of this depression in the neighborhood of Big Soda Lake is in a general northeasterly direction with a grade of about 10 feet to the mile. The lowest depressions in the earth's surface within this area are the Big and Little Soda Lakes and the Carson River. Prior to the year 1907 the surface of the Big Soda Lake was about 3,935 feet above sea level. The Carson River approaches within 2 miles of this lake, at which point its altitude is about 4,000 feet, and it flows in a general easterly direction until it reaches a point near the town of Fallon, at which it turns and runs in a general northerly direction.

The Big Soda Lake is the result of accumulations of water in a volcanic crater drawn from the general body of underground waters in the Carson Sink Valley. This crater forms an inverted conical depression in the floor of Lake Lahontan with a rim rising from 80 to 100 feet above the floor of the present valley and with deep converging inner walls.

The seasonal rainfall upon the valley floor averages about 4 inches, and is negligible as a source of ground water replenishment. The bottom of this lake was below the level of the water table, and the only known source of water supply was the small springs
17 which seeped into the lake. These springs were supplied by seepage from the Carson River, the only known source of supply of underground water of this valley. These underground and percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move underground.

From prior to 1867 to 1906 the level of Big Soda Lake had not raised more than 2 feet.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson project, consisting of dams, canals, and other structures, whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906, and during each year since then, transferred to the watershed of the Carson River. This water together with surface waters entering the Carson River from its own watershed, was by this irrigation project conserved, controlled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T line canal, U line canal, and N line canal, and Truckee canal with their laterals. Each of said canals passes within two miles of Big Soda Lake except the Truckee canal, and their altitude is about 100 feet higher than the lake and about 40 feet higher than Carson River. This irrigation system transports large amounts of water through each of said units during the irrigation season of each year, which includes the months of April and September, and stores large quantities of water in the Lahontan Dam during every month of each year.

The plaintiff's predecessors in interest conveyed to the United States a right of way through its lands for the construction of the Truckee-Carson project in consideration "of the benefits derived

from the construction of irrigation works through or in the vicinity of the said lands." The contract by which the plaintiff's predecessors in interest agreed to convey said right of way to the United States contained the following provision: "It is further agreed that in consideration of the premises, the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works." The deed made in pursuance of said contract did not contain the aforesaid provision. The evidence does not disclose what, if any, damage resulted to the plaintiff from the construction of any of said works on the land of the plaintiff.

With the advent of the Truckee-Carson project the body of ground water in the entire section covered by the project rose; the volume of water in Big Soda Lake has continually increased, and the level of said lake has risen about 19 vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated; and the value of the property of the plaintiff has been destroyed.

From the time the Truckee-Carson project was completed in 1906 to the year 1915 over 26,000 acres of additional land had been subjected to irrigation under the project, there having been 14,000 acres under irrigation before the project was completed.

18 No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals or units of the project.

The value of the property of the plaintiff which has been destroyed is $45,000.

Under this state of facts is the United States liable for the destruction of the plaintiff's property under the fifth amendment of the Constitution?

It is well settled that the fifth amendment to the Constitution, which provides that private property shall not be taken for public use without just compensation, does not impose upon the United States any greater liability than would attach to an individual or ordinary corporation. So far as we have been able to ascertain, it has never been held that this amendment amplifies or enlarges the responsibility of the Government beyond the legal liability of persons, either natural or artificial. Indeed, this doctrine has been asserted by the Supreme Court of the United States, not, it is true, with respect to cases involving irrigation projects, but in cases involving the rights of riparian owners who have sought to recover for damages to their property caused by the Government in its work in improving navigable streams. Bedford v. United States, 192 U. S., 217, 223; Jackson v. United States, 230 U. S., 1, 21, 22.

There is no dispute about the powers of the Government to construct the works which, it is claimed, caused the destruction of the plaintiff's property. It is alleged by the plaintiff that the Government in the exercise of its power of eminent domain under the Constitution of the United States, and by authority of the acts of Congress, did construct, build, and maintain certain canals, etc. Nor is the legality of the acts of the Government in any way questioned

by the plaintiff. Indeed, the plaintiff conveyed to the defendants a right of way through its land for the construction of the canals, of the result of which construction the plaintiff now complains. If, therefore, the United States can not be held any more liable than an individual or ordinary corporation for the acts complained of, it becomes important to inquire to what extent, if any, an individual, or ordinary corporation, could be held liable for the destruction of the plaintiff's property under the state of facts disclosed by the record.

The plaintiff is the owner of a lake which for many years has been used by it and its predecessors to manufacture soda from its waters, and it has erected a plant consisting of vats, houses, etc., to aid it in this manufacture. The irrigating system, where put into operation, causes an increase of underground water not only affecting the plaintiff but the whole territory in which the land of the plaintiff is situated. The question then is, would the plaintiff have the right, as against an individual or ordinary corporation to prevent him or it from irrigating the lands of this valley, if such irrigation has the effect of increasing the quantity of underground water, to such an extent as to submerge the lake of the plaintiff and destroy the value of its property? It hardly seems possible to reconcile such a right with the rights of landowners, or to fix any reasonable limits to the exercise of such right. Such a right as that contended for would practically prevent the irrigation of all the lands in the Carson Sink Valley. Suppose a man irrigated his own land, and the amount of percolating water which found its way into the lake of the plaintiff had a sensible
19 effect upon it, it would not be contended that an action would be maintainable. But if all the landowners of the Carson Sink Valley irrigated their lands, and thereby increased the amount of underground water to such an extent as to destroy the property of the plaintiff, could the plaintiff maintain an action against any one of them, or could it maintain an action against a corporation which did the same thing as the owners themselves could do? Such a right as that claimed by the plaintiff is too indefinite and unlimited. The principles applicable to surface waters do not pertain to underground waters, which have no certain course or defined limits. In the case of Kansas v. Colorado, 206 U. S., 46, 107, the court says: "Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something, proof of which must necessarily be almost impossible. The underground movement of water will always be a problem of uncertainty." Percolating water is a hidden, invisible thing. How it moves is more a matter of conjecture than knowledge—of inference rather than proof. It would seem impossible to apply any law, beyond the general principle of reasonable use of one's land, to such a hidden and formless thing. Weil on Water Rights, vol. 2, p. 1093. It seems, therefore, that the existence, origin, movement, and course of underground waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be practically impossible, because any such recognition of correlative rights would interfere to the

material detriment of the Commonwealth with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building, and general progress of improvement in works of embellishment and utility. Angell on Watercourses, 7th edition, 171.

It seems to us that while the property of the plaintiff may have been destroyed by the irrigation system of the Government, yet the influences which have brought about this destruction are so secret, changeable, and uncontrollable that we can not subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface; so that if the plaintiff has incurred a loss from the movement of these underground waters in this valley it is damnun absque injuria.

It would appear that the claim of the plaintiff is that primitive conditions must be suffered to remain, and that no progress or development can be had, if the property of the plaintiff should be injured thereby. Thus a claim is set up to a vested right to keep conditions in statu quo which existed at the time its property was acquired to the extent of preventing anyone from improving surrounding property, unless damages are paid to the plaintiff. Such a doctrine would result in preventing the owners of surrounding property from putting their property to its legitimate use.

From the very nature of the case, and the character and movement of underground water we conclude that the property of the plaintiff was not destroyed by a direct invasion, but was the incidental consequence of the lawful and proper use of a government power, and therefore there can be no recovery.

20 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Twentieth day of October, A. D., 1919, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge and decree that the Natron Soda Company, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and against the defendants, the United States; and that the petition herein be and it hereby is dismissed. And it is further ordered, adjudged and decreed that the defendants, the United States, shall have and recover of and from the claimant, the Natron Soda Company, as aforesaid, the sum of Eight Hundred and Eighty-four Dollars and forty-six cents ($884.46), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VII. *History of Further Proceedings.*

On November 17, 1919, by leave of court, the claimant filed a motion to amend the new findings of fact, which motion was overruled by the court, January 12, 1920, in an opinion by Hay, J., which is as follows:

21 VIII. *Opinion by Hay, J., Entered January* 12, 1920, *on Claimant's Motion to Amend Findings of Fact.*

HAY, *Judge*, delivered the opinion of the court:

This is a motion of the plaintiff to amend the findings of fact in this case (1) so as to show the ultimate facts as to the cause of the rise of water in Big Soda Lake and the inundation of the adjacent land which resulted in the destruction of the plaintiff's property, or (2) by setting forth what the plaintiff asserts are "the circumstantial facts" shown in the evidence as to the cause of the rise of water in Big Soda Lake and as to the value of the property of the plaintiff.

The rules of the Supreme Court regulating appeals from and governing the findings of fact in the Court of Claims were promulgated at the December term, 1865; 3 Wall., p. VII. These rules prescribed that "The facts so found are to be ultimate facts or propositions which the evidence shall establish in the nature of a special verdict, and not the evidence on which these ultimate facts are founded."

At the October term, 1873, a change was made in the above rule, and that rule now reads as follows: "A finding by the Court of Claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; * * *," 17 Wall., p. XVII. Since then no change in this rule has been made.

At the December term, 1869, rule 5 was promulgated as follows:

"Rule 5. In all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal to this court." 9 Wall., VII.

On January 29, 1879, the Supreme Court promulgated a substitute for the above rule, which is as follows:

"In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of fact." 97 U. S., p. 11.

The findings of fact which the plaintiff seeks to have amended contain, in the opinion of the court, the facts established by the evidence in this case. What the plaintiff seeks to add as amendments to the findings of the court are not facts established by the evidence, but evidence of facts; and such findings would be in contravention of the rule which provides that the court must find "the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them." In the case of Burr v. The Des Moines Railroad and Navigation Co., 1 Wall., 99, 102, the Supreme Court says:

"The statement of facts on which this court will inquire if there is or is not error in the application of the law to them is a statement of the ultimate facts or propositions which the evidence is intended to establish and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness, and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon."

See also McClure v. United States, 116 U. S., 145, 151, 152.

22 In the case of The Delaware, Lackawanna and Western Railroad Co. v. United States, decided January 6, 1919 (and not yet reported), Chief Justice Campbell, speaking for the court, says:

"Under the rules of the court and its decisions it is not difficult for parties to make requests for findings in accordance with the well-established practice. But these requests are frequently mere conclusions of fact or of law, intermixed with argument, find no support in the evidence adduced, and omit the references required by the rules."

In the case at bar the court has found the facts as they are established by the evidence, and has included in its findings all the facts established by the evidence which "have been proven and which are material to the due presentation of the case of the plaintiff." It will not be asserted that under rule 5 quoted above the plaintiff or defendant can of right have included in the findings of fact evidence of facts which he may assert to be facts established by the evidence. In other words, the rule can not be construed to mean that this court must include in its findings any evidence which the parties may ask to have included therein upon the mere statement that such evidence is a fact proven. This court in the last analysis must determine what are the ultimate facts which the evidence establishes. McClure v. United States, supra. If it was left to the parties to say what the findings of the court must include it is obvious that the findings of the court would no longer contain facts established by the evidence in the nature of a special verdict, but would be made up of all the evidence in the case and would impose upon the appellate court all the functions of a jury.

The plaintiff has referred us to the case of United States v. Pugh, 99 U. S., 265, 270, which it insists is applicable to this case. In that case the Supreme Court held that "when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record."

But this is not the case of the plaintiff. Its case does not depend upon "circumstantial facts alone." Indeed, what it denominates circumstantial facts are evidences on which the ultimate facts are supposed to rest, and this court has found those ultimate facts and has put into the record every fact which the plaintiff has proved and which is material to the due presentation of its case. What the plaintiff asks us to find are conclusions, and not ultimate facts established by the evidence.

The motion to amend the findings of fact must be overruled.

23 IX. *Claimant's Application for, and Allowance of, an Appeal to the Supreme Court.*

Claimant hereby prays an appeal to the Supreme Court of the United States from a judgment of this court rendered on the 12th day of January, 1920, reaffirming a judgment rendered on the 7th day of April, 1919, and the 20th day of October, 1919, by which the petition was dismissed.

FRANK S. BRIGHT,
Attorney for Claimant.

Filed January 29, 1920.

Ordered: That the above appeal be allowed as prayed for.

BY THE COURT.

February 2, 1920.

24 Court of Claims of the United States.

No. 32453.

NATRON SODA COMPANY, a Corporation,

vs.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of the court by Hay, J.; of the judgment of the court; of the opinion of the court by Hay, J., on the claimant's motion to amend findings of fact; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City this 7th day of February, A. D. 1920.

[Seal Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 27,475. Court of Claims. Term No. 720. Natron Soda Company, appellant, vs. The United States. Filed February 12th, 1920. File No. 27,475.

FILE COPY

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1920

No. 226

JOHN HORSTMANN COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

EDWARD M. CLEARY,
Attorney for Appellant.

THOMAS A. ALLAN,
Of Counsel.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1920

No. 222

JOHN HORSTMANN COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

Statement of the Case.

This suit was filed in the Court of Claims, January 6, 1913, by the John Horstmann Company, the owners of certain lands in Churchill County, Nevada, surrounding and including a lake known as Little Soda Lake (R. 8, Finding of Fact I).

Prior to and during the year 1906 the said lake and lands surrounding it were in the actual posses-

sion of the appellant and its predecessors, who were manufacturing soda from the waters of said lake which was valuable and was being marketed by it. The original plant for the recovery of the mineral contents of the waters of Little Soda Lake had been constructed many years prior to its acquisition by the appellant, had been improved and enlarged by it and was in full operation up to and in the year 1906. Little Soda Lake is most of the time a dry lake bed, with here and there the mineralized water standing in pools, and which was pumped therefrom by the appellant's employes into earth vats, constructed by it along the edge of the lake, to be evaporated therein in the manufacture of soda (R. 8, Finding of Fact II).

Little Soda Lake is situated in the Carson Sink Valley, a depression in the earth's surface covering many thousands of acres and during a past geologic age was the bottom of an inland sea, now called Lake Lahontan, but in fact prior to the year 1906 was an arid area.

The slope of the depression is northeasterly and the grade about ten feet to the mile. The original bed of Lake Lahontan where was the so-called Little Soda Lake, has been covered by the elements since the dessication of Lake Lahontan by deposits of sand, clay, silt, cinders and other forms of disintegrated rock substance, and fissures and cracks exist throughout the mass, and which are not uniform; and this mass being the earthen bottom and sides of

the so-called lake and of the surrounding lands of the appellant which have been submerged.

The lowest depressions on the earth's surface within this area are the Little Soda Lake and the Big Soda Lake and the Carson River, and prior to 1907 the surface of Little Soda Lake was about 3935 feet above sea level and that of the Carson River about 4,000 feet, and within two miles or less of the lake (R. 8 & 9, Finding of Fact III).

Little Soda Lake's only known source of water supply, prior to 1906, were small springs which seeped into the lake from its bottom and sides, and these springs were supplied by seepage from the Carson River (R. 9, Finding of Fact IV), the bottom of the lake being not only below the level of the adjoining water table, but sixty-five (65) feet below the surface of the adjoining Carson River and the seasonal rainfall at this point averaging but four (4) inches and being practically negligible as a source of ground or lake water replenishment (R. 9, Finding of Fact V) and this being in an arid country where the yearly evaporation is many times in feet this evaporation in inches.

From prior to the year 1867 to 1906 the level of Little Soda Lake had not varied more than two (2) feet (R. 9, Finding of Fact VI) and until after the United States Reclamation Service had constructed what is known as the Truckee-Carson Project.

The Truckee-Carson Project consisted of canals, dams and other structures, whereby large quantities

of surface and other waters theretofore confined to the watershed of the Truckee River, and to the adjoining State of California, and separated from the watershed of the Carson River by hills and highlands, were transported to the watershed of the Carson River (R. 9, Finding of Fact VII) and to the Carson River, the only theretofore known source of water supply of Little Soda Lake.

In 1906 and during each year since then this Truckee-Carson Project, which was a national irrigation project, has brought over from the Truckee River watershed large quantities of water that otherwise would not have been there, and passed the same through many units thereof, among them being the canals known as the T line Canal, U line Canal and the N line Canal (R. 9, Finding of Fact VII) and all of which canals virtually surround Little Soda Lake, within two (2) miles thereof, and one of which being between the lake and the Carson River, and the altitude of the canals being one hundred feet higher than the surface of the lake and about forty feet higher than that of the Carson River (R. 9 & 10, Finding of Fact VII). Large amounts of water passed through all of these canals from April to September, inclusive, and large quantities of water were stored at the Lahontan Dam during every month of each year (R. 10, Finding of Fact VIII), and the surplus water from this dam passed into the Carson River and augmented the volume thereof, there being no other outlet from the Lahontan Dam other than the canals and the Carson River.

While from prior to 1867 to 1906 the level of Little Soda Lake remained within two (2) feet (R. 9, Finding of Fact VI), with the advent of the Truckee-Carson Project the volume of water in Little Soda Lake has continually increased and the level of the lake's surface has risen about nineteen (19) vertical feet since the project was opened up; the recovery of minerals, such as soda, from the waters of the lake is no longer possible; the machinery, vats, houses and other improvements which constituted the manufacturing plant of the appellant have been permanently flooded, and the lands of the appellant immediately surrounding Little Soda Lake have been permanently inundated, and the value of the property of the appellant has been destroyed (R. 10, Finding of Fact VIII).

While the level of the lake varied within two (2) feet from before 1867 to 1906, with irrigation of 14,000 acres within the scope of this project (Finding of Fact VI) immediately upon the operation of the Truckee-Carson Project and the bringing into the watershed of the Carson River the waters of the Truckee watershed, the level of the lake commenced to rise rapidly and with the increase twofold of the lands theretofore under irrigation, the water in the lake has risen vertically nineteen (19) feet and entirely submerged the property of the appellant (R. 10, Finding of Fact IX).

The canals ramify an area close to 100,000 acres, in 1906 irrigated 40,000 acres and no negligence is

alleged or proven in the construction or operation of the project, and the value of the property destroyed has been found to be $9,000.00 (R. 10, Finding of Fact IX, X, XI).

The Court of Claims held as a conclusion of law that upon the facts found the appellant was not entitled to recover and rendered judgment in favor of the United States.

Assignments of Errors.

The Court of Claims erred:

First. In holding there was not a taking of the appellant's property within the meaning of the constitutional provision.

Second. In rendering judgment against the appellant and in favor of the United States, and

Third. In failing to render judgment in favor of this appellant.

Argument.

PROPOSITIONS.

This case will be considered under the following general propositions:

1. **There was a taking of the appellant's lands within the meaning of the Constitution.**

That there was a taking within the meaning of the Fifth Amendment to the Constitution appears

from the findings of fact, which will be considered specifically later on.

The decision of the lower court is based upon the decisions of this court in the cases of Bedford v. U. S., 192 U. S. 217, Jackson v. U. S., 230 U. S. 1, and Kansas v. Colorado, 206 U. S. 46, and the case of the Natron Soda Co. v. U. S., 54 C. Cls. 169.

Both the Bedford and the Jackson cases involved the rights of riparian owners, who sought to recover for damages to the property caused by the government improving a navigable stream on which they were located and in subordination and subservience to which right of the government the properties involved admittedly were.

But it is a far different matter when the government, as in the case at bar is not improving the harbors and rivers but is building an irrigation system over private and public lands. This, we believe, is a point which should not be lost sight of, as in the cases above cited the government bases its rights to do the acts involved on that power. This distinction is recognized by Judge Morrow in Cohen v. United States, 162 Fed. 364. On page 368 he said:

> "The present case is distinguished from the foregoing cases in the fact that Sausal Creek is not a navigable stream and the construction of the canal by the government was not for the benefit or improvement of that stream, but for the improvement of navigable waters in another and different locality, and it is claimed by the petitioner that the injury she suffered was the taking of her private property (the waters of

> Sausal Creek) for a public use, and that for the taking she is entitled to just compensation. This distinction between acts of the government damaging private property on a navigable stream in the work of improving its navigability and the taking of private property connected with an unnavigable stream for public use in improving navigable waters elsewhere was recognized when the court disposed of the demurrer to the complaint."

But aside from this distinction the acts of the government in both the Gibson and Bedford cases are materially different from the cases of United States v. Lynah, 188 U. S. 445; Williams v. United States, 104 Fed. 50, and Heyward v. United States, 46 Ct. Cl. 484, and the case at bar. The clearest exposition of the difference between the present case and the Gibson case is to be found in the opinion of Mr. Chief Justice Fuller in that case, wherein on page 276 he says:

> "In those cases (referring to the Lynah and other like cases) it was held that permanent flooding of private property may be regarded as a 'taking'. In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case there was no such invasion. No entry was made upon the plaintiff's lot. All that was done was to render for a time its use more inconvenient."

It should be noted that in the Bedford case existing conditions were not changed, as they were in this case, and which was or should be stronger than all of the cases that have heretofore been heard in

this court, where lands have been flooded, and where the lands were either themselves on a navigable stream, or a navigable stream was being improved and the lands were on another stream. But in the present case the question of improving a navigable stream is not involved. Neither the Carson nor the Truckee Rivers were being improved for navigation or are navigable streams in fact. The work being prosecuted was a reclamation project.

In the present case there is a taking as fully as in the Lynah case, i. e., the land is completely submerged and destroyed for all purposes for which it can be used. In the Gibson case what was done to the petitioner's land? Nothing whatever. No water, soil or other substance was placed thereon either temporarily or permanently. The only damage was for the loss or inconvenience suffered by petitioner by the erection of an improvement in the navigable waters (which the government had a perfect right to make), by which it was made more difficult for the owner of the land to gain access to and from the same by its waterfront.

In the Bedford case the government's acts were of the character that every riparian owner has the legal right to perform, i. e., to protect his own lands from overflow by the building of revetments, or other structures to prevent the overflow.

The case of Jackson v. United States, 230 U. S. 1, is likewise a case involving riparian rights and subservience thereto of the private owners to

the rights of the government to improve the navigability of a navigable river.

With reference to the quotation and citation of the case of Kansas v. Colorado, 206 U. S. 46, at page 170 thereof, it would seem that certain language in this case is sought to show that "percolating waters are hidden and invisible" and which is doubtless often the fact with waters, the percolating waters in this case were doubtless invisible while they were percolating through the lands but they were atrociously evident at a later period when they submerged and occupied the property of this appellant.

When in the early stages of this case a demurrer was filed therein by the government that *scienter* must be alleged and proven (48 C. Cls. 423) Mr. Justice Barney, in overruling the demurrer said:

Upon the oral argument in this court the defendant's counsel admitted that the facts as alleged state a cause of action within the case of Lynah v. United States (188 U. S. 445) except that it was contended that, as the injuries complained of were not open, visible and notorious there should have been an allegation and proof that the destruction resulting from the water conveyed in said canals and ditches was reasonable to have been anticipated.

> "It appears to the court that counsel makes the mistake of confounding the taking of property with the means by which it is taken. The taking may be by the action of causes which were not anticipated; it may not have been intended or contemplated, but after the cause has acted and the unexpected taking has been ac-

complished, it is open, notorious and visible as though it was the result of intention. * * *

" * * * in suits against the government for the taking of property under the fifth amendment to the Constitution the question is whether the property has been taken or not and not *how* it has been taken. If land has been submerged by water flowing or seeping under the surface of the ground, it has been taken just as effectually as though it had been submerged by water flowing above the surface. Whether the damage caused by a flying missile is direct or consequential does not depend upon whether it passed unseen in the night or in broad daylight. It would be a travesty upon justice for the government to effectually take property from one of its citizens and then plead the small boy's defense, 'that it didn't mean to'.

"The Supreme Court said in Lynah v. United States, supra, 'It is clear from these authorities that when the government, by the construction of a dam or other public works, so floods lands belonging to an individual as to substantially destroy their value, there is a taking within the scope of the fifth amendment.' (Ibed, 470) There is nothing said as to *how* this flooding is to be done or as to whether it is to be intentional or not. In fact, in that case a portion of the flooding was caused by percolation and a portion by flowage upon the surface, and no distinction was made between the two methods of taking."

The case of United States v. Williams, 188 U. S. 445, was also one where the government had the right to improve navigation.

In the case of United States v. Heyward, affirmed by this court at the last term by a divided court it was also one involving the improving of navigation,

a riparian owner and where the government had superior rights.

But in the cases United States v. Cress, 243 U. S. 316, and the Kelly case, decided at the same time, we have a case not even as strong as the one now under consideration. In those cases the improvement of a navigable river was involved, though the claimants were not riparian owners on the river improved. But in the present case, there is no question of improving navigation. It is a question of supplying irrigation facilities, and while the government has the right to construct and operate the project, it is the duty of the government to pay for the land taken thereby.

In United States v. Cress, supra, at page 321, Mr. Justice Pitney says:

> " * * * the test of navigability is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures, that the public right is to be measured by the capacity of the stream in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right."

Idem, page 326:

> "In United States v. Lynah, 188 U. S. 145, the same principle was applied in the case of operation by the Government of the United States * * * The raising of the water

above its natural level was held to be an invasion of the private property thereby flowed."

Now, the water level of the river is the height of the river, and the water level of the land is the ground water level, which the government in the present case admits raising.

Now, a further principle upon which the action in this case was dismissed by the lower court upon final hearing, and after Mr. Justice Barney had retired from the bench, was that the government would not be liable for an action which resulted in the submersion and destruction of the property involved, if a private party could not be held liable for the same act, and that the owner of lands had the absolute right to irrigate his lands and bring water therefor from away, and which but for such bringing would not be there, and that the lower proprietor is subservient to the seepage from additional water brought from afar for irrigation purposes.

The proposition that a private party would not be liable in this case is not the law in the arid states where irrigation is mostly practiced or where the irrigation was carried on in this case.

It was said in Boynton v. Longley, 19 Nev. 73:

"In a dry and arid climate where irrigation is necessary in order to cultivate the soil the question as to the rights of proprietors of upper and lower lands in regard to the waste water has seldom arisen, because, as a general rule, the lower land owner is willing to receive, dispose

of, profit by the use of all water flowing from the upper lands of another in irrigating his own land. It is seldom that any landowner in this State has occasion to complain of too much water. The cry is, usually, not for less but for more.

"As to the flow of water caused by the fall of rain, the melting of snow, or natural drainage of the ground, the prevailing doctrine is that when two tracts of land are adjacent and one is lower than the other, the owner of the upper tract has an easement in the lower tract to the extent of the water naturally flowing from the upper to and upon the lower tract and that any damage that may be occasioned to the lower land is *damnum absque injuria.*

"The rule above stated applies only to waters which flow naturally from the causes stated. Courts have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man."

Wiel on Water Rights, 3d. E., p. 492:

"He is responsible to the plaintiffs only by injury caused by his negligence, or those *wilfully* inflicted in the exercise of his right of irrigating his land."

Wiel on Water Rights, p. 492:

"Only *vis major* will dissolve from breach of contract, however, as distinguished from tort." (We have here an implied contract.)

Boynton v. Longley, 19 Nev. 73.

Opinion of Hawley, J.:

"Water seeks its level and naturally flows from a higher to a lower plane; hence the lower surface, or inferior heritage, is doomed by

nature to bear a servitude to the higher surface, or superior heritage, in this, that it must receive the water that naturally falls on and flows from the latter. The proprietors of the lower land cannot complain of this, for *aqua currit et debet currere ut solebat*. But this rule—this expression of the law—only applies to waters which flow naturally from springs, from storms of rain or snow, or the natural moisture of the land. Whenever courts have had occasion to discuss this question they have generally declared that the servitude of the lower land cannot be augmented or made more burdensome by the acts or industry of man (See authorities cited in the briefs of counsel)."

The opinion then goes on to quote Wash. on Easements, 450, and says:

"The latter cannot by artificial trenches or otherwise cause the natural mode of its (water on his land) being discharged to be changed to the injury of the lower field, as by conducting it by new channels, in unusual quantities on to particular parts of the lower field."

Hawley, J., Idem, p. 74:

"In the case under consideration the facts are different from any of the decided cases. Here both the parties are farmers, engaged in the ordinary cultivation of their respective lands by artificial irrigation. To conduct and carry on this business profitably, it is absolutely necessary to bring water from points where it can be obtained, remote and distant from their lands. Without the reasonable use of this water their lands would be comparatively worthless. The law should not be construed so as to deny or materially abridge the rights of either party to prosecute his agricultural pursuits, or deprive him of any of the incidents necessary to culti-

vate and improve his lands. We are of the opinion that the upper landowner while having the undoubted right to make a reasonable use of the water for irrigation, must so use, manage and control it, as not to injure his neighbor's lands. *Sic utere tuo ut alienum non leadas.* He should not be permitted to make his estate more valuable by an act which renders the estate of the owner of the lower lands less valuable. The general doctrine is derived from the civil law; it is in harmony with the rules established by a majority of the decided cases having any analogy to the case at bar, and it is, in our opinion, founded upon substantial reasons of justice and equity."

Shields v. Orr Ditch Co., 23 Nev. 355:

"The owner of an irrigating ditch is bound to keep it in good repair and is liable for damage caused by seepage of water from it."

Idem:

"A person owning a ditch from which water escapes upon the premises of an adjoining landowner cannot escape liability on the ground that such landowner might, at a small expense, have prevented any damage by digging a ditch on his own land that would have carried off the waste water." (Showing liability for seepage from ditches.)

Parker v. Larsen, 86 Calif. 236:

"The rule applicable to the percolation of water from a natural water course does not apply to water brought upon the land by artificial means; but in such case the rule applies, that where one brings a foreign substance on his land he must take care of it, and not permit it to injure his neighbor, and is subject to the maxim *sic utere tuo ut alienum non laedas.*

Wilson v. New Bedford, 108 Mass. 264.

Chapman, Ch. J.:

"The petitioner alleges that this reservoir has caused damage to him by reason of the percolation of water from the reservoir, underground to his house and cellar and barn cellar, about a thousand feet distant from the dam, and alongside of it, and preventing the natural passage of water underground into the natural stream on which the dam is constructed.

"The respondents have so raised their dam and reservoir as to cause an artificial pressure of the water through the soil, and by its action it has flooded the petitioner's cellars. Probably it can not be ascertained precisely how it acts underground.." * * * "In Monson v. Brimfield Manf. Co. vs. Fuller, 15 Pick. 554, it was decided that damage occasioned by the percolation of water through the earth from the pond to neighboring uplands and causing them to produce poorer grass or a smaller quantity of grass, could be recovered * * * The principle is just; for the water often injures land which it never overflows; and where the soil is porous the water may by percolation render a dwelling house uninhabitable, or destroy the value of large tracts of land. * * *

"We think the petitioner's claim is not only sustained by authority but founded on justice. He ought to be compensated for such an injury as the petition describes, and the law would be defective if it failed to give him a remedy."

Pixley v. Clark, 35 N. Y. 520.

Peckham, J.:

"It was proved on the trial that the embankment was well made, and no signs of wet on its outside appeared. From these facts the judge held the water must have gone through the nat-

ural earth in the creek into this land, and not through the embankment, or between it and the natural soil, and non-suited the plaintiff. On appeal that nonsuit was sustained by the General Term in the Fifth District, and the plaintiffs appealed to this court.

"The single question presented on these facts is whether the defendant had a right to 'drown' the plaintiff's sixteen acres of land by pressing the water through the natural banks of the stream, or otherwise. If he had, the nonsuit was right—if not—it was erroneous. * * *

"The defendant's counsel says that the defendant had the right to build the dam to use this waterpower, 'and all that can be legally required of them is that they shall exercise it so as not to injure, directly of unnecessarily, the lands of their neighbor'; also he says that 'if one do a lawful act on his own premises, he cannot be held for the injurious consequences, unless it was so done as to constitute actionable negligence.' These, like many general propositions, are plausible, but, as applied to this case, in the sense they are sought to be used, neither of them is law, and never was. Take the first: Is any such principle found in any case, or stated by any elementary writer, as that you have a right to use your water power, and build a dam for that purpose, and, if necessary to that end, you may flow and drown your neighbor's land provided you do not do so 'unnecessarily.' That you may do it so far as is necessary to the full and profitable enjoyment of your waterpower, even though you flow and destroy his farm.

"The other proposition is very similar. Was it ever held or pretended that you might build a dam, and flow another's land, provided you were guilty of no want of care or skill in its construction? In fact, the better dam you

make, the more water you restrain and throw back—the greater the damage to the adjoining landowner. These are sound maxims applied to many cases, but not to all. The latter may be admitted and applied here. The act of the defendants was lawful in building their dam, so long as they did not injure their neighbor's land. The moment they so interfered by their dam as to flow his land to his injury, the act was unlawful. Did any declaration aver that the defendant, in building his dam 'unnecessarily' threw the water into plaintiff's land, or that he did so by carelessly or negligently constructing his dam. No such precedent can be found. The complaint in this case contains no such allegation. * * *

"Again the defendants insist that the laws of surface streams do not apply to water circulating or percolating through the natural soil under the surface of the earth. The nonsuit was placed on this ground. No one disputes this, as an abstract proposition. But that does not aid the defendants. They must show that the rule applies the other way—that is, that the rules applicable to subterranean water apply also to living surface streams. That they will fail to establish."

Page 529, Idem:

"Surely, if you cannot subtract or divert the water of a surface stream to the injury of a riparian owner, even by percolation caused by a well on your land, you will be liable to your neighbor for your direct interference with a surface stream, whereby he is injured by percolation you have yourself unlawfully created. In Cooper v. Barber (3 Taunt), the plaintiff had diverted the water of a surface stream by penstocks, to irrigate his land; by means thereof, he injured the defendant's land

through the consequent percolation of water under the soil so as to overflow his kitchen and cellar. The defendant broke down one penstock and removed the upper boards of another, and his house became directly dry. In an action by plaintiff for destroying the penstocks, the court held the action would not lie for that part of the injury to the penstocks necessary to abate the nuisance.

"The principle which exempts a party from liability for digging upon and cultivating his own land as he pleases, though he may interfere with subterranean water is designed for the benefit and protection of the landowner. As sought to be applied here it would work to his great injury. Landowners, under this rule, in the neighborhood of surface streams, could never know their rights or the value of their lands. They would be subject to the superior rights of millowners to damage the land for their benefit, without compensation.

"The case then stands thus. The defendants are sued for drowning the plaintiff's land by an unauthorized interference with a surface stream by pressing a part of that stream through its banks, by means of their artificial works, into the lands of the plaintiff to his injury. The defendant's answer, true, we did that for our benefit, but the law allows a party to interfere with underground, dead or percolating water, by sinking a well or digging drains on his land. The reply is, you have interfered with a surface stream, not with underground, percolating water, and hence the doctrine of those cases affords you no protection. The point is, that the defendants, by their interference with a surface stream have wrongfully pressed a part of it into percolating water, and thus drowned the plaintiff's land. When sued upon for this interference with a living, sur-

face stream, they answer that they are not liable for interfering with water percolating under the earth. They insist upon defending themselves against something for which they are not prosecuted. To hold that defendants would be liable, if their interference with the surface stream had damaged the plaintiff by overflowing the natural banks and pressing it through the artificial embankments, but not if they pressed it through the natural banks, would be about as sound legal justice to my mind, as if we should hold a man liable for stabbing another in the bosom, but, if he stabbed him under the arm, though the knife should come to the same point in the body, there should be no liability.

"Defendants also insist they are not liable because it is not known how the injury occurred—that the principle is not understood. It is clear in this, as in the case of Cooper vs. Barber (3 Taunt. 99), and upon like proof, that this dam has, in fact, caused the injury, though we may fail to discover the principle upon which it was done. The learned judge there called it a mere pretense to contend otherwise as to the fact. The defendant, then, is as much answerable for it as one would be who choked another to death, though it should be proved that science was utterly unable to declare how life should entirely leave the body by mere pressure upon the throat for a couple of minutes. These defendants tried an experiment for their own benefit, and found it seriously injured the plaintiff. When they see the injury they insist upon continuing it. They add that the plaintiff can protect himself, if he will appropriate a part of his land to a ditch, and will incur the expense of digging the ditch and keeping it in repair for their benefit. This shocks the sense of honesty and justice. To

look after the mysteries that attend the circulation of subterranean water, not caused by interfering with a surface stream, is to seek darkness rather than light. There is no mystery as to the cause of this damage.

"It is a familiar rule that the pressure of water is in proportion to its height. The water was raised much higher than in its natural condition, and its natural banks, by this dam, and it is entirely clear that it was pressed into this land, either through the natural or artificial banks, or else between them. That was the position assumed at the circuit; when the water from the dam was drawn off, the water left this land. It is, therefore, not that the defendants have unreasonably, negligently, unintentionally, unnecessarily or unexpectedly flowed the plaintiff's land, to his injury, for their benefit, that they are liable. It is simply because they have done it in fact; they have done it by their works, and it cannot be charged to extraordinary floods. In the language of the old books, 'the defendants *exaltavunt stagnum* by which the plaintiff's meadow was flooded and they are liable therefor' (Godbolt, 58). The necessity, motive, knowledge or care of defendants forms no element of this action. Not the peculiar mode or manner of the injury, but the fact of the injury caused by the dam, in any mode or manner, is the ground of the action. Landowners have purchased their farms where a surface stream runs, in view of the conceded right to have that stream continue as it had been accustomed to run. If its current be interfered with in any manner, to the damage of land, an action lies. An owner may dig upon and cultivate his own land at his pleasure, though he cut off or open water circulating or dead under the earth to his neighbor's injury. Such water is not different from the earth itself.

He owns it. He does not own the water of a surface stream, and cannot set it back to another's injury without liability."

Reed v. State, 108 N. Y. 407. Ruger, Ch. J., cites Pixley v. Clark, supra, and says, p. 414:

"It does not at all follow from the right that a landowner has, of lawfully digging on his own land for his own use, even though he thereby interrupts a subterranean current which feeds his neighbor's well or spring, that he has also a right to divert running water into an underground channel and thereby flood his neighbor's lands."

Carrington v. Brooks, 121 Ga. 253. Evans, J.:

"The substance of the court's instruction was, that although the dam may have remained unchanged in height for twenty years, yet, if during that time, by reason of a change in using the water, it caused the filling up of the bed of the stream with sand, injuring and damaging the plaintiff's land by percolation and seepage of the water, this was an invasion of his land and he had the right to recover for any injury that occurred to him within four years preceding the bringing of the action."

Farnham, The Laws of Waters and Water Rights, Vol. 3, page 2800, note:

"The owner of premises damaged by seepage of water from an irrigating ditch is entitled to an injunction restraining a repetition thereof for the vindication and preservation of his right."

Idem, Vol. 2, p. 1769, Sec. 549:

"The level of water standing in .the soil will usually correspond quite closely to that of

the water flowing in the stream, so that anything which raises the height of the latter will prevent the water in the soil from finding its way into the stream and will render the land adjoining the stream wet and unfit for cultivation. And any act of the lower owner which will tend to cause such a condition is a wrong to the upper owner and he is entitled to maintain an action to protect his right."

Idem, Vol. 2, p. 1770:

"The permanent maintenance of the water of a navigable lake at a height above high-water mark constitutes a taking of the property of the adjoining owners which entitles them to compensation."

Idem, p. 2153:

"In time, if the courts are as active in establishing new rules governing subterranean waters within the next few years, which rules have but kept pace with the scientific investigations upon the subject, this class of subterranean waters (percolating) will pass from the class of those flowing in unknown courses to those flowing in known courses, and the 'secret incomprehensible influences' and 'practical uncertainties' will become comprehensible influences and practical certainties" (Citing cases).

North Point C. O. Co. v. Utah & S. L. C. Co., 16 Utah, 246. Zane, Ch. J., p. 266:

"But the Canal Company defendants claim that the seepage and surplus water from the lands irrigated by them flows naturally into White Lake, a part of the Surplus Canal. Undoubtedly a proprietor of higher land is entitled to the benefit of the natural flow therefrom, onto the lands of another, of surface or

other water not brought there by artificial means. But when water is brought onto the higher land by artificial means, the proprietor is not entitled to such natural flow onto the land of another, to his injury. The proprietors of higher lands have not the right to the natural flow of water brought onto their lands by artificial means. If natural forces alone bring water onto a man's land, he may allow natural forces to take it off, though it may be deposited on the land of another to his injury. Seepage from lands, caused by irrigation water, brought in canals or other artificial ditches, cannot be regarded as natural seepage or drainage. It was not brought there alone by natural laws, as water from rain, snow or springs is."

In this case the government has endeavored to limit the proximate cause to the word "adjacent". That the water must come directly from the canals or dams to the lake as through a visible pipe. The findings of fact clearly show that the Carson river was the only theretofore known or conceivable supply of water for this Little Soda Lake and it is certainly apparent that the excess of water is now caused by the Truckee Carson project; had it not been constructed the lake would not have been submerged. That the water from this project did more than take the appellant's property, does not relieve the government from paying for this taking. And the lower court, it is respectfully submitted, was in error in deciding against the appellant because they did not see the water flow when the water that had flowed was so manifest. It was the water that had flowed and which submerged the

property that is the taking; not the flowing of the water.

It is respectfully submitted that the judgment of the Court of Claims herein should be reversed, with directions to enter up judgment in favor of this appellant for the sum of $9,000, as found in Finding of Fact No. XI (R. 10).

Respectfully submitted,

EDWARD M. CLEARY,
Attorney for Appellant.

THOMAS A. ALLAN,
Of Counsel.

BRIEF

STATEMENT OF FACTS

The statement of facts which are deemed material to the issue are set forth in appellant's accompanying brief in support of a motion for remanding of record.

ASSIGNMENT OF ERRORS

The Court of Claims erred—

1. In failing to find that there was a taking of appellant's property within the meaning of the Constitution.

2. In rendering a judgment against the appellant and in favor of the United States.

3. In failing to render a judgment in favor of the appellant.

4. In adjudicating the claim case under the common law rule governing percolating waters, whereas the principles of law involved are those governing watercourse waters.

5. In failing to find material facts which were established by evidence and which are proper to be considered if the case comes within the rule governing watercourse waters.

6. In failing to find that certain contract set forth in finding of fact No. 9 was a *nudum pactum*.

7. In basing its conclusion as to the value of the appellant's property which was taken upon incompetent evidence and ignoring established facts to the contrary.

ARGUMENT

The Court below made no attempt to determine whether the destruction of the value of the property of the appellant was the direct result of the actions of the defendant complained of, and even refused to find as a fact that water when moving underground obeys the laws of gravity, though that fact was not only established in evidence, but both parties requested the Court to find it as a fact.

Appellant claims that it has not had an adjudication of its case because of a fundamental error in law by the Court below, and that error consisted in adjudicating the case under the common law rule that Courts will not take cognizance of the consequences of the diversion or interception of percolating waters even though it be to another's injury. The reason of that common law rule is that the origin, movement and course of such waters, prior to any action of any party, is involved in uncertainty, and it would be difficult to administer any legal rules in respect to them. Thus the opinion of the Court below is based on the assumption that "it is not known how underground waters are governed, how they move underground." (Finding of Fact

No. 5, transcript, p. 8) * * * *"the principles applicable to surface waters do not pertain to underground waters, which have no certain course or defined limits"* * * * Percolating water is a hidden invisible thing. How it moves is more a matter of conjecture than knowledge —of inference rather than proof. It would seem impossible to apply any law, beyond the general principle of reasonable use of one's land to such a hidden, formless thing. It seems, therefore, that the existence, origin, movement and course of underground waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect to them would be involved in hopeless uncertainty, and would be practically impossible. * * * It seems to us that while the property of the plaintiff may have been destroyed by the irrigation system of the Government, yet the influences which have brought about this destruction are so secret, changeable and uncontrollable that we cannot subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface. * * * From the very nature of the case, and the character of the movement of underground water, we conclude that the property of the plaintiff was not destroyed by a direct invasion." (Transcript pp. 13, 14.)

We maintain that there is no evidence in the record to support such a holding. So far as the

* Italics ours.

evidence is concerned we submit that it is directly contrary to the evidence and to the facts established in evidence.

Appellant maintains that this case does not involve a question of the rights or obligations of parties with respect to percolating waters and that the rule which should be applied is that governing water-course waters. If the Court had adjudicated the case under the principles of law which are applicable, the findings of fact would have been very different, for the court could not then have ignored all evidence tending to show the existence, origin, movements and course of the waters which caused the destruction of the value of the appellant's property. Surely the fact is patent upon its very face that at least one fact was established by appellant showing some relation between the flooding of appellant's land and the fact that several large canals of the appellee were constructed within two miles of the appellant's property, practically surrounding it at a higher altitude than appellant's property and within an area in which the drainage was to appellant's property. *The findings of fact do not show how close some of these canals approached the property of appellant, but the findings of fact are to the effect that there were at least three of such canals practically surrounding appellant's property within a radius of two miles, and that a large quantity of water was transported through said canals.* Will this Court believe that the appel-

lant did not establish as a fact that some water seeped from said canals? Yet the Court refused to find that as a fact. The appellant in this case, in support of its motion to remand the record, has referred to a mass of uncontradicted evidence all going to show that the taking of the appellant's property was the direct result of the operation of appellee's irrigation project. Will this Court believe that the appellant and appellee could both have agreed upon a finding of fact which was not established in evidence, or that the appellee would have asked for a finding of fact to the following effect:

"IX.

"That the seepage from the Government canals caused ridges of ground water to form directly under such canals (694, 698, 700, 840, testimony), and such ridges restrained seepage from the Carson River and from irrigated lands under the project from entering the Soda Lakes area, which otherwise would have entered the area. (694, 698, 700, and 847, testimony; 680, Lee-Clark report.)

"X.

"That because seepage into the ground water from the Carson River and irrigated lands caused a general rise in such ground water, a backwater effect was produced against the ridges formed by seepage under the Govern-

ment canals, forcing considerable of such canal seepage into the lakes area which otherwise would have moved outside of said area. (699, 844, testimony; 680, 684, Lee-Clark report.)"

(See Defendant's objections, &c., p. 1119.)

Yet, as quoted on page 5 of appellant's motion to remand the record in this case, we refer to such a requested finding of fact submitted by the appellee. Attention is particularly invited to a requested finding of fact by the appellant which was concurred in with unimportant modifications by appellee, on pages 17 to 19 of appellant's brief in support of the motion to remand.

Counsel for appellee, in his brief, correctly states that we declined "to produce Hamlet without the character of Hamlet." We are entitled to have Hamlet in the play. We believe that it is the purpose of this Court to do justice between the parties and that we are entitled to have the Court of Claims find the ultimate fact, whether the rise of waters in Big Soda Lake, which destroyed the value of the appellant's property, was, or was not, caused by the operation of the Government's irrigation project, or else that that court shall certify to this Court the circumstantial facts which will enable this Court to determine the issue upon all of the facts established in evidence. The Court below refuse and decline to find any of the circumstantial facts which were established in evidence, for

instance (even those agreed upon by both parties), which went to show whether or not the excess waters entering Big Soda Lake came from the irrigation canals of the irrigation project, or to find the ultimate fact, whether or not the destruction of the value of appellant's property was the result of the operation of the said irrigation project. If the Court had been in doubt as to any point it could have directed the taking of more evidence.

It is respectfully submitted that the Court made a fundamental error in considering that this case presented only the question of the *rights* of parties respecting percolating waters. The defendant brought into Carson River Valley an immense amount of *surface* water from the Truckee River, and transported it at the surface in its ditches to the immediate neighborhood of the claimant's land. As a direct result of the action of the defendant, some of this *surface* water so transported has flooded the claimant's land and destroyed its value. It is immaterial whether the water entered the claimant's land by overflow from the defendant's ditches or by seeping from the ditches through the ground. It is not the medium through which the water travels that determines the question of liability, and it is immaterial whether the course of the water in traveling from the ditches to the claimant's land was observable, or hidden and unobserved, so long as the result is certain. Such

was the decision of this Court upon the demurrer in this case.

The present decision, however, seems to hold that an individual (and therefore the government) is not liable for flooding the lands of another providing there is no negligence and providing that the excess water accomplishes the damage by seepage underground and not by seepage overflow.

We respectfully request the Court to reconsider this case in the light of other adjudications by various courts, of cases involving questions which are also presented in the case at bar.

We respectfully contend that the observations in the decision quoted from Angel on Watercourses and Weill on Waterrights are not now authoritative, and that those quoted from the decision of the Supreme Court in the case of Kansas vs. Colorado must be modified in view of the recent growth of knowledge regarding irrigation, drainage and underground waters, and the recent decisions of the courts upon questions involving those subjects.

The Court is requested to again consider the facts in this case with reference to their relation to the facts in the cases of Bedford vs. U. S. (192 U. S. 217) and Jackson vs. U. S. (230 U. S. 1).

In both of those cases the Court held that the action of the government complained of was merely the restraining of natural forces from changing the conditions then existing, whereas in this case, as in the Lynch, Cress, and Kelly cases, the action complained of was an alteration of natural conditions then existing.

In the Bedford case the Court held that it was the change in the course of the Mississippi River which caused the injury complained of and that that change was due entirely to natural causes. The river, because of its change of course, was a destructive force, eroding and overflowing land, and the action of the government complained of tended to interrupt the further change in the course of the river and keep the course of the river as it then was. It was the continuation of the natural condition as it then was that caused the lands in controversy to be eroded; whereas, in this case the actions of the government complained of changed natural conditions, introduced new and foreign elements, and the new and altered condition produced the injury. If in the Bedford case it had been held that the action of the government had caused the Mississippi River to change its course, then the two cases would have been more nearly parallel, but upon the facts as presented, there is a wide difference between the two cases.

In the Jackson case the alleged injury resulted from the failure of governmental, state and sub-

ordinate agencies (including action of the claimants) to completely remedy a destructive natural condition. Floods of the Mississippi River were overflowing and destroying abutting property. The claimant and others had attempted by the construction of levees to keep the river within its banks. The levees which the claimant had constructed for the protection of his own land were rendered ineffective by other constructions by other persons and the government, for the protection of other land and in aid of navigation. In other words that was a case in which natural conditions were required to be changed to prevent destruction, and the claimant complained because the government had done, for the protection of other lands, the same thing that he had done for the protection of his own lands. If in the Jackson case it had been held that the government had been responsible for the floods then the two cases would have been somewhat similar, but we submit that the facts in the Jackson case and the case at bar are so dissimilar that there is no analogy between them.

The case at bar is much more similar to the cases of Lynah vs. U. S. (188 U. S. 445), Kelly vs. U. S. and Cress vs. U. S. (243 U. S. 316), upon which we rely, and to which we again most earnestly ask the attention of the Court, because they seem to us controlling, and that the Court has erred in holding that the Bedford and Jackson cases control instead of the Lynah case, as it held in the decision upon the demurrer herein.

Appellee contends that appellant is estopped from claiming any damage on account of injury sustained by the operation of the Government's irrigation project because it had made a contract (and deed in pursuance thereof) in consideration of "the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described."

The court failed to find that *any benefits* whatsoever were derived from any construction by the defendant, and appellant showed that instead of the promised "benefits" the appellee proceeded to destroy the value of all of the appellant's properties which were to have been benefited. What, then, was the consideration for the deed? Surely, promised benefits never received are not a good consideration.

Respectfully submitted,

FRANK S. BRIGHT,

H. STANLEY HINRICHS,

Attorneys for Appellant.

SUBJECT INDEX

TABLE OF CASES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1920.

No. 247

NATRON SODA COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

APPELLANT'S MOTION FOR REMANDING OF RECORD.

Now comes the appellant, and moves the Court to remand the record in this case to the Court of Claims with instructions to find and certify to this Court, as matters of fact, in addition to those found and certified in said record:

1. Whether percolating waters are governed by the same hydraulic laws as surface waters, and move underground through the interstices between the particles of sand, clay and other character of soil immediately below the surface of the earth, and through cracks and crevices, between such impervious strata as exist, and along a plane known as the ground-water level.

Whether the law of gravitation, the sizes of the

crevices and the frictional resistance caused by the particles around which the water must pass are dominating factors in determining the movement of said underground waters, and position and direction of the ground-water level.

Whether, in the immediate vicinity of Big and Little Soda Lakes, in what is termed the drainage area of the Soda Lakes, consisting of about 4,500 acres, there is a localized water slope from all sides into the lakes, owing to the fact that the water level of said lakes (due to evaporation) is lower than the surrounding ground water level.

And whether the movement of these ground waters is more rapid than is the general movement northeasterly.

2. Whether there are about 10 miles of canals of the Carson-Truckee Project within the said drainage area of the Soda Lakes, and the said canals practically surround Big Soda Lake within said drainage area, and a part of the water passing through the said canals seep into the said drainage area therefrom.

3. Whether the evidence shows the claimant or its predecessors in interest received any consideration for the contract to convey, or for the deed conveying, the right of way for the canals of the Carson-Truckee Project over its lands, or derived any benefit from the construction of said Project.

4. What was the estimated content of the sodium-carbonate in the waters of Big Soda Lake in tons before the claimant and its predecessors in interest commenced their operations, and what is the estimated quantity of said mineral recovered from said lake by the claimant and its predecessors in interest.

5. What was the cost of recovering said mineral

content from Big Soda Lake and manufacturing sodium-carbonate therefrom and transportation to market in 1906 and 1907, per ton, and the sale price per ton during the same period.

6. What was the estimated capacity of the claimant's plant in tons per annum, and whether a new carbonating process had been perfected shortly before the destruction of plaintiff's plant, whereby production was capable of being greatly increased.

7. What is the estimated re-production cost of plaintiff's plant and what was the cost of the said plant, and what is the estimated value thereof at the time of its destruction?

8. Whether there are any other facts established in evidence which are deemed competent and material in determining what is the market value of the property of plaintiff which was taken, and if so, to set forth the said facts; and if any of said facts relate to a compromise settlement between joint owners or partners, all of the circumstances of said settlement should be set forth.

The first of the above requested additional findings of fact is considered by the appellant to be necessary and material to enable this Court to decide justly whether appellant's property was taken by the Government's irrigation project. It is considered that the said facts were established in evidence, and there was no conflict in the testimony as to any of them. Indeed the identical language has been adopted which was embodied in a requested amendment offered by the Government to a finding requested by the claimant in the Court below. It is therefore of facts admitted by the Government. Said finding was refused by the Court below because of a fundamental error as to the rule of

law which should be applied in adjudicating the case. The Court erroneously ignored all facts (even those admitted by both parties) relating to the seepage or movement of underground waters into Big Soda Lake, because of the common law rule as to percolating waters, whereas the said common law rule has no application to this case.

The second requested additional finding of fact is considered by the appellant necessary and material for the same reasons as above, and there is no conflict of evidence as to said facts. Indeed the boundaries of the said drainage area and the position of the canals of the Government's irrigation project with reference thereto are graphically shown on maps introduced into evidence by both parties. (See Claimant's Exhibit Forbes, Nos. 2 and 3; Defendant's Exhibit No. 1, Plate III; Defendant's Exhibit Clark No. 2.) Not only so, but the Government in the Court below requested additional findings of fact as follows:

"IX.

"That the seepage from the Government canals caused ridges of ground water to form directly under such canals (694, 698, 700, 840, testimony), and such ridges restrained seepage from the Carson River and from irrigated lands under the project from entering the Soda Lakes area, which otherwise would have entered the area. (694, 698, 700, and 847, testimony; 680, Lee-Clark report.)

"X.

"That because seepage into the ground water from the Carson River and irrigated lands caused a general rise in such ground water, a backwater effect was produced against the ridges formed by seepage under the

Government canals, forcing considerable of such canal seepage into the lakes area which otherwise would have moved outside of said area. (699, 844, testimony; 680, 684, Lee-Clark report.)

(See Defendant's objections, &c., p. 1119.)

The third requested additional finding of fact is considered by the appellant necessary and material because the Court below in finding number IX (transcript p. 9) found as a fact that appellant's predecessors in interest executed a certain contract and conveyance which fact is irrelevant and immaterial unless this Court should conclude therefrom that the appellant is estopped from claiming damages on account of the taking of its property by reason of construction and operation of the Government's irrigation project. It is considered that the facts established in evidence show that *in law* the alleged contract was a *nudum pactum*, and the deed also was without consideration, and it would be unconscionable for the Government to attempt to make anything out of them.

The remaining requested additional findings of fact are deemed necessary and material because it is considered that the finding of the Court below as to the value of the appellant's property which was destroyed is not warranted by the established circumstantial facts which are relevant and material. There was no witness who testified that the value of the appellant's property which was destroyed was $45,000, and the Court's finding, number XII to that effect (transcript p. 10) cannot be reconciled with any evidence except that relating to a certain compromise settlement between two partners under circumstance which, *in law*, render it incompetent in determining the market value

of the property.

A brief on this motion is filed herewith.

FRANK S. BRIGHT,
Attorney for Appellant.

AFFIDAVIT

District of Columbia, ss:

Personally appeared before me Frank S. Bright, who, being duly sworn according to law, deposes and says that he is attorney for the appellant in the above-entitled cause; that he has read the foregoing motion and understands its contents; that the matters and things therein stated are true in substance and in fact, as he is informed and verily believes; and that in his opinion this motion for remanding the record is well founded in law, is in the interest of justice, and is not interposed for the purposes of delay.

FRANK S. BRIGHT.

Subscribed and sworn to before me this 19th day of September, 1821.

JOHN F. A. BECKER,
Notary Public.

(Seal)

BRIEF

I. STATEMENT OF FACTS.

This action is to recover the market value of certain property of the Natron Soda Company, appellant, herein. The said company owned Big Soda Lake in Carson River Valley, Churchill County, Nevada, and a tract of land surrounding it on all sides. The waters of said Lake were impregnated with sodium-carbonate

Prior to and during the year 1906 the said lake and lands surrounding it were in actual possession of the appellant and its predecessors, who were manufacturing soda from the waters of said lake. This soda was marketed by the appellant, and this product so manufactured and marketed made the lake aforesaid valuable to the appellant.

A plant for the recovery of the mineral contents of the waters of Big Soda Lake had been constructed many years prior to the acquisition of the property by the appellant, and had been improved and added to by it, and was in full operation in the year 1906.

In 1906 the United States Reclamation Service, acting under authority of acts of Congress, constructed the Truckee-Carson Project, consisting of dams, canals, and other structures whereby large quantities of surface waters theretofore confined to the watershed of the Truckee River were in 1906 an during each year since then transported to the watershed of the Carson River. This water, together with surface waters entering the Carson River from its own watershed, were by this irrigation project conserved, controlled, and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes. Among the units comprising this irrigation system is a dam known as Lahontan Dam, and canals known as T line canal, U line canal and N line canal and Truckee canal

with their laterals. Each of said canals passes within two miles of Big Soda Lake except the Truckee canal, and in the neighborhood of the lake their altitude is about 100 feet higher than the lake and about 40 feet higher than Carson River. This irrigation system transports large amount of water through each of said units during the irrigation season of each year, which includes the months of April to September, inclusive, and stores large quantities of water in said Lahontan Dam during every month of each year. In its ultimate development the project contemplates the reclamation of 206,000 acres of land. The canals of the project ramify an area of close to 100,000 acres.

With the advent of the Truckee-Carson project, the body of ground water in the entire section covered by the project rose; the volume of water in Big Soda Lake has continually increased, and the level of said Lake has risen about 19 vertical feet during the period from 1906 to 1916; the recovery of minerals from the waters of said lake is no longer possible; the machinery, vats, houses, and other improvements which constitute the manufacturing plant of the plaintiff have been permanently flooded; the land of the plaintiff immediately surrounding said lake has been inundated, and the value of the property of the plaintiff has been destroyed.

The Court below did not find as a fact whether or not the taking of the appellees property was caused by the said irrigation project, though that fact may be inferred from the other facts found. The Court below found that the appellant's predecessors in interest had executed a certain contract and deed from which it is possible that the inference might be drawn that the Government had secured the right to permit waters of its irrigation project to enter upon the land of appellant.

The Court also found that the value of the property of the appellee which was taken was $45,000, but does not state upon what established facts the finding was based. The claimant in the Court below requested that the Court find said value to be $170,000 and the defendant requested that the Court find said value to be $30,000. The market value of the property is a doubtful one and can be fixed only by a consideration of several circumstantial facts.

II. ARGUMENT.

The petition in brief alleges that by reason of the establishment by the Government of the Truckee-Carson Irrigation Project valuable property of claimant, namely, Big Soda Lake, was submerged so as to make it valueless, and therefore under the principle of the Lynah case (188 U. S. 444) was so taken as to entitle claimant to compensation.

There are three issues in the case: two of fact and one of law. The first issue is: Was the destruction of the value of claimant's property caused by the Government? This is a clear issue of fact. If the injury was not caused by the Government, then, of course, there would be no liability. If it was caused by the Government, then the issue of law would arise as to whether the taking was of such character as to make the Government liable, as in the Lynah case, or whether it was a mere consequential injury for which there could be no compensation, as in the Jackson case. (220 U. S., 1.) If it is found that the taking was of the character that entitles the owner to compensation, then the third issue, which is one of fact, is: The amount of the compensation; that is, the value of the property taken.

z An examination of the findings of fact as made by

the Court of Claims will disclose immediately that there is no finding at all of the Court upon the first and most essential question of fact, and without such finding, or a finding of all the circumstantial facts established in evidence bearing upon said question, the case cannot be presented to this Court. The finding shows (V) that the rainfall upon the surface which drains into Big Soda Lake averages about four inches per annum and is a negligible source of ground water replenishment; that the bottom of the Lake was below the level of the water table and the only known source of water supply was small springs which seeped into the Lake, which springs were supplied by seepage from the Carson River; that (VI) from 1867 to 1906 the level of Big Soda Lake had not raised more than two feet; that is, for practically forty years and up to the very date of the erection of the Government improvement, the level of the Lake had been practically fixed; that (VI) at the beginning of 1906 the operation of the Truckee-Carson Irrigation Project was started by the Government and a large amount of water was transported through the canals of said project around Big Soda Lake; that these canals were much higher than Big Soda Lake. While it is not shown in the findings as made, the evidence shows that there were ten miles of these canals within the drainage area of this Lake. The findings then show (VIII) that with the advent of this project the water in Big Soda Lake, which had been at a fixed level for forty years, immediately started to rise and continued to rise until it was nineteen feet higher than the former level and all of claimant's property was submerged. Yet, there is nothing whatever in the findings of the Court of Claims to show that this was caused by the works of the Government, and in fact finding (V) to which claimant has always strenuously objected and which

is inconsistent with the other findings) gives the inference that there is nothing in the evidence to show that the rise of the water was caused by the Government work. The court states in this finding.

> "Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move under ground. The slope of the Carson Valley is in a northeasterly direction."

Though the facts can only show one result; namely, that the Government work necessarily caused the rise in the waters of Big Soda Lake, and that there is nothing else which could have caused it; yet the court makes a negative finding that there is nothing to tell how waters move under ground.

The above motion contemplates the finding of additional undisputed circumstantial facts bearing upon the question whether the destruction of the value of claimant's property was caused by the Government. It seems to us that the Court below should have determined that ultimate fact, and appellant requested a finding that the injury was caused by seepage from the canals of the Government irrigation project. However, in view of an error of law by the Court below, any direction to find that said fact should be coupled with an instruction as to the rule of law which is to be applied in considering the evidence. It is hoped that upon consideration of the above motion this Court will in its discretion give both instructions. The motion is in accordance with the practice approved in the cases of *Ripley* v. *U. S.* (220 U. S., 491; 222 U. S., 144), and *U. S.* v. *Pugh* (99 U. S., 265).

It is respectfully submitted that the court below made a fundamental error in considering that this case

presented the question of the *rights* of parties respecting *percolating waters.* The appellee brought into Carson River Valley an immense amount of water-course water from the Truckee River, and transported it at the surface in its ditches to the immediate neighborhood of the appellant's land. As a direct result of the action of the appellee, same of this water-course water so transported has flooded the appellant's land and destroyed its value. It is immaterial whether the water entered the appellant's land by overflow from the appellee's ditches or by seeping from the ditches through the ground. It is not the medium through which the water travels that determines the question of liability, and it is immaterial whether the course of the water in traveling from the ditches to the appellant's land was observed, or hidden and unobserved, so long as the result is certain.

The present decision seems to hold that an individual (and therefore the government) is not liable for flooding the lands of another providing there is no negligence and providing that the excess water accomplishes the taking by seepage underground and not by overflow upon the surface.

The percolation in this case was artificial, and it is well established in decisions of the courts that recovery may be had for injury caused in such a case, without regard to whether there was negligence.

The rule that the rights of parties to percolating waters will not be subjected to regulations of law has been qualified in later cases, but artificial percolating is not within the rule and in this case artificial percolation was set in motion by the diversion of surface streams and the rule of law governing water-course waters applies.

See 30 Am. Eng. Encycl. Law, pp. 314, 321 and 322 and cases therein cited.

The ultimate fact whether the appellant's property was destroyed by the irrigation system of the Government is dependent upon circumstantial facts alone. Some of those facts have been set forth in the findings of fact while others, which the appellant believes are just as material, and which have been fully established, and upon which there was no conflict of evidence, have been omitted.

The apellant requests a review of the conclusion of the court below as to the legal effect of the circumstantial facts and conceives it necessary that all of said facts which are established in evidence shall be set forth in the findings of fact.

We do respectfully, but earnestly, contend that there is a mass of uncontradicted and undisputed evidence in this case showing how underground or percolating waters are governed, and how they move underground, and what was the direction of such movement in the immediate vicinity of Big Soda Lake. The facts established by this evidence clearly show that the first and second requested additional finding of fact are fully warranted. A reference to some of said evidence supporting the first and second requested additional findings follows:

In the report of Messrs. Haehl and Forbes (Pltfs. Ex. "Forbes No. 1") it is stated:

> "The usual sources of underground water in any valley are seepages from local precipitation and from streams which traverse the porous materials of the valley fill. The water thus contributed passes downward, if it encounters no impervious stratum, and establishes a zone of saturation above the rock bottom of the valley. Groundwater bodies are seldom stagnant, but under the influence of gravity and against the frictional re-

sistance of the materials of the valley fill, maintain a slow movement from their source toward some lower point of escape. The surface of the zone of saturation is termed the ground-water table, and it assumes a slope or gradient in the direction of its movement, the rate of movement in homogenous material being greater in the direction of greatest slope. In general the ground-water slope or 'gradient' will conform to the relief of the ground surface, although the gradient is usually less than the surface slope." (1007).

D. W. Cole, a witness for the government, testified that the universal law of gravitation is the only thing that moves water, except perhaps such minor influences as capillary attraction and evaporation; that the movement of water through soils is retarded to a greater or less extent by the character of the soils. (486).

The same witness also testified that underground water "is dependent primarily, as I said before, on the law of gravity, that is, water, either in a stream or in the ground, will seek to go toward the center of the earth unless there is some interference to prevent, deflect, or retard such movement." (503).

The same witness testified that "the ground-water of the country most probably originates in the streams which flow into that section, either as rivers or canals, or as water put upon the surface for irrigation. That is undoubtedly the source of that water." (524).

E. G. Hopson, a witness for the government, testifield that underground water gravitates along the line of greatest declivity. (386, 437).

Joseph Jacobs, also a government witness, testified that, all other things being equal, the ground waters would tend to move in the direction of the greatest declivity. (614).

Defendant's witness E. G. Hopson testified that the

level of the lakes is below that of the ground-water plane and the movement is into the lakes from said plane in all directions (405, 412).

The same witness also testified that the contour lines of the ground-water plane on plate 4 of the "Defendant's Exhibit No. 1" show a drop of 40 feet in 1¼ miles immediately surrounding the lakes (436). The same witness testifies that the greatest declivity is on the west side of the lake (396 to 399).

The report of Hopson, Cole & Jacobs, ("Defendant's Exhibit No. 1"), states that because of the lake depressions the water table is distorted and drawn down from all directions towards and into the lakes, with, however, the greater hydraulic head obtaining on the south side (630). And that the present drainage area tributary to the Soda Lakes is approximately the "Soda Lake Area" of 4,852 acres, the boundary of which is practically fixed by the location of local ground-water sources, namely, the T, U and N canals (675).

Witness Clarence L. Anderson testifies that immediately surrounding the lakes on all sides there is a general declination towards the lakes (264).

Defendant's witness, W. O. Clark, testifies that, as shown on Government's Exhibit, "Clark No. 2," the slope of the water table in the immediate vicinity of the lakes is towards the lakes from every direction (696).

Witness C. H. Lee, for the defendant, testified that the velocity of movement of ground-water is controlled by several factors; that it does not move rapidly through very fine materials; that it moves more freely through sand than through clay; that mixtures of silts with sand tends to reduce the rate of movement; that fine particles tend to obstruct the rate of movement through coarser sand; that fault planes are often encountered in rock substance in which clay exists, and water will often be found moving on the upper side of

such clay layers, in the open fractures of the rock with more or less rapid movement; that in alluvial material the movement is very slow as compared with the movement through cracks and fissures in hard crystalline rock (834, 835).

The report of Lee and said Clark, (Defendant's Exhibit, W. O. Clark, No. 1), states it is to be fact that part of the water from the T, N and U canals has reached the lakes and been lost in evaporation (680).

The porosity (void spaces) of the soils surrounding the Lakes was testified to by several witnesses. Haehl and Forbes, witnesses for the plaintiff, stated it to be from 20 per cent to 40 per cent and averaging 25 per cent (911, 912, 932, 1013, 1024).

Tests made by Forbes and Haehl of material out of this mass showed 21.1 per cent, 22.2 per cent, 27.4 per cent and 35.9 per cent (1013, 1024).

In the report of Hopson and Cole and Jacobs, *supra*, it is stated that the soils contain about 33 1/3 per cent porosity (628, 631, 632).

Witness Hopson testified that the above estimate was based upon actual tests (442).

Messrs. Lee and Clark in their report, *supra*, estimate the porosity at from 35 per cent to 40 per cent (682).

Based upon the above evidence and other evidence of the same purport, the claimant asked for a finding as follows:

> "That percolating waters are governed by the same hydraulic laws as surface waters, they move underground through the interstices between the particles of sand, clay and other character of soil immediately below the surface of the earth in the neighborhood of Big and Little Soda Lakes, and that such movement is through cracks and crevices, between such impervious strata as exist and

along a plane known as the ground-water level. That the law of gravitation, the sizes of the crevices and the frictional resistance caused by the particles around which the water must pass are dominating factors in determining the movement of said underground waters, and position and direction of the ground-water level.

"The general movement of these ground-waters follows the slope of the Carson Valley and is in a northeasterly direction, though, in the immediate vicinity of the lakes, in what is termed the Cone of Influence of the Soda Lakes, owing to the fact that the water level of the Lakes is lower than the surrounding ground-water level, there is localized water slope from all sides into the Lakes, and the movement of these latter waters is more rapid than is the general movement northeasterly." (See joint Request for Finding of Fact pps. 5-6).

The Government accepted said proposed finding of fact with only slight modifications (which are unimportant) as follows:

"X"

"Defendant objects to the words 'immediately below the surface of the earth in the neighborhood of the Big and Little Soda Lakes,' as unsupported by the testimony; the testimony does not show the condition to be different there than elsewhere as the statement indicates, nor that the waters are 'immediately' below the surface. The whole clause should be eliminated.

"Defendant objects to the words 'Cone of influence of the Soda Lakes,' for the term as applied by the different engineers had different meanings (1023 Haehl-Forbes report), and we ask that the following words be substituted: '*drainage area of the Soda Lakes areas consisting of about* 4,500 *acres.*' (682 Lee-Clark report; also see Notron Soda Company's request No. V.)

"Defendant asks that after the words, 'owing to the fact that the water level of the Lakes,' in the fourth paragraph, there be added the words '*due to evaporation*' (679). As the sentence now stands, the inference is that the level of the Lakes is not governed by the level of the ground-waters of the area. (Haehl-Forbes report, 1008.)" (See p. 1112 of "Defendant's Objection.")

The report of Lee and Clark, *supra*, states that the drainage area tributary to the Soda Lakes "is practically fixed by the location of local ground-water sources, namely, the T, N and U Canals" (675). In the same report the result of the evaporation from the surface of the Lakes (4 feet per annum) is likened to the operation of a pump in a well, producing a draft. The report states that "When a pump commences to operate in a well the water in the well is at once lowered, thus leaving the water level outside the well higher than that in the well. This sets up a movement of groundwater into the well and establishes a slope of the water table toward the well from all directions" (679).

The report states that seepage from those canals also formed ridges of water which inhibit other waters from entering the area, and said ridges form the boundaries of the drainage area into the Lakes (674, 675, 680, 683).

The testimony of said witness C. H. Lee and the testimony of said witness W. O. Clark is to the same effect (697, 698, 699, 776 to 781, 840, 841, 843, 844, 871, 872, 873).

The report of Lee and Clark,*supra,* shows that the seepage into the drainage area of the Soda Lakes from the T, N and U canals during the period from 1906 to 1915 was 30,103 acre feet (683, 684). The level of the Lakes during that same period rose about 15 vertical feet (705). And said witness E. G. Hopson estimated that that aggregates about 4,800 acre feet (431, 432) or less than started towards the Lakes from the T. N and U canals within the drainage area of the Lakes during the first two years of the project.

Not only so, but the testimony of Lee and Clark and the report of those witnesses are to the effect that after making deductions for all the water which is inhibited from entering the drainage area of the Lakes due to the back-water effect of the ridges under the canals of the project, from 66 per cent to 74 per cent of the increase of waters in the drainage area of the Lakes are seepage waters from the T, N and U canals (683, 684, 685, 775 to 789, 845).

The evidence is to the effect that Truckee River water was turned into main canals for irrigation purposes on August 15, 1906 (623), and that 1906 was the last year of actual manufacture of soda on Big Soda Lake (623). The evidence of W. R. Streeper is to the effect that in 1907 the principal work done on the Lakes was the raising of levees, trying to keep water out of the vats (137, 138). Thos. H. Means, the engineer in charge of the Project, reported, January 28, 1909, that "during the last three years the Lake has been raising. It has raised so much that Mr. Griswold finds it impossible to maintain these levees, and as there is no more ground on which these tanks could be built his business

of soda-making at the Lake is *ruined* (635).

It is considered that finding of fact number nine of the court below (transcript p. 9) is misleading and susceptible of significance which is not warranted by the facts upon which said finding was based, and that it is possible that the court might be misled thereby. We submit that the contract referred to was a *nudum pactum* and does not warrant any deductions adverse to the plaintiff, and that it is unconscionable for the defendant to attempt to make anything out of it.

If the appellant is foreclosed from its remedy because of the contract and deed the situation is analgous to the story of the camel which was allowed to get its nose in the tent. The government secured a right of way over a small part of claimant's land in consideration of alleged benefits to be secured from the construction of an irrigation system. Thereafter the government proceeded to construct an irrigation system which resulted in the taking of the entire tract under the guise of said alleged "benefits."

There is no evidence in the record that the appellant or its predecessors in interest were promised, or that they derived or received any benefits whatever from the construction of the irrigation works, or how they were to be benefited; and there is no evidence that there was any other consideration promised or received for the execution of said contract. The only testimony in the record concerning the clause in the contract which is quoted in finding number nine is the deposition of Eugene Griswold, who denies that he ever saw such a statement in the contract. The claimant merely gave to the government without any consideration whatever so much land as it might require for the construction of ditches and the right to enter his land to construct them (304-5), and that is all there is to the contract or

deed. There is no evidence that any damage resulted or has been claimed by the appellant on account of the use of the land in constructing any ditches or the survey of the land for that purpose or in the construction of any of the ditches. There is no evidence that the line of survey had been run when the contract was executed and it is not shown in evidence that Griswold knew where the ditches would run. The Government could have acquired by condemnation proceedings a release of any consequential damages to other parts of the tract due to the operation of the irrigation system, and if there was in contemplation on the part of the Government the avoidance of liability for damages on account of any taking or destruction of the valuable plant of the plaintiff, in procuring him to sign said contract and deed a fraud was perpetrated which in good conscience this Court should refuse to enforce.

The finding of fact number twelve of the court below (transcript p. 10) is not considered to be warranted by relevant circumstantial facts which are established in evidence.

Plaintiff requested court to find that the value of its property, which had been destroyed, was $140,000. The defendant requested that the amount be fixed at $30,000, on the ground that Griswold, (one of the two owners of the capital stock of the corporation) had purchased his partners interest for $15,000. If the court based its conclusion upon said sale the court erred because the evidence clearly shows that said sale was a *compromise settlement between two partners*, after a suit had been instituted, and that while Griswold only paid $15,000 *in cash* the business was in his debt to an amount not stated and he also parted with "other considerations," the nature or value of which is not shown in evidence. (Rec. pp. 302, 997). It is submitted that

said transaction is not competent evidence to be considered in determining the *market value* of the property.

The measure of compensation which should be paid for property taken is the fair market value—the price which would be procured by a prudent seller, at liberty to fix the time and conditions of sale. Manifestly a compromise settlement of a suit between partners affords no criterion of the market value of the property which is the subject of the suit.

See 10 Am. & Eng. Encycl. Law, pp. 1151-2 and cases there cited.

It is considered that the actual market value of the property which was destroyed is somewhat in doubt and depends upon circumstantial facts but that the conclusion of the court below is manifest inadequate and the plaintiff requests that the conclusion of the court below, based upon these facts, be reviewed. The factors entering into the question of market value of plaintiff's property which was destroyed, as shown by competent evidence, are as follows:

Russell estimated that there were 528,000 tons of sodium-carbonate in the lake in the 80's. Less than 28,000 tons have been taken out since then (Defendant's Ex. Clark No. 6, p. 80.) Evidence was introduced showing that soda can be manufactured at a cost of from $12 to $16 per ton (279, 283, 290, 993) and could be sold at from $22 to $30 per ton. In 1906 and 1907 the cost of manufacture and transportation was about $12.25 per ton and the soda brought from $22 to $25 per ton. (37, 139, 140, 144, 289, 290, 993).

In 1906 the cost of transportation was lowered by virtue of the establishment of a more accessible railroad shipping point (36, 37) and the carbonating process had been perfected whereby production was ca-

pable of being increased enormously, rendering the property very much more valuable. (290 to 293, 299, 300, 991, 992, 997).

The evidence indicates that the plant already constructed was capable of yielding about 500 tons per annum (283) under the old process and the report of Chatard was to the effect that the lake should produce more than twice that much annually. (Ex. Wrinkle No. 1, pp. 4 to 52, 58.) This, without taking into consideration the improvements referred to above. On the basis of its income producing value, therefore, the property was worth more than $140,000.

On the basis of the cost of reproduction the uncontradicted evidence is that the improvements were worth $65,461 (281,998,101), which does not include the land, or the value of Soda Lake itself, which is the principal property involved, and that which makes the other units useful. If the Lake is not worth $140,000, certainly the Lake and $65,000 worth of improvements and the land were worth that much in 1907.

On the basis of actual cost, the property was worth considerable. The construction of the vats cost prior to 1892 in excess of $40,000. (292). The carbonating furnace cost $13,000 to $15,00 (290) and the reverberating furnace cost about $2,000. (294).. The houses cost about $1,500 (295) and the concrete pipe line cost $15,000 to $20,000 (292), making a total of more than $73,500 without counting the cost of any of the land, of many of the improvements referred to in the testimony, the cost of three years experimenting to get chloride or sulphate of potassium (282), and four years experimenting to get a sufficient and successful carbonating apparatus. (290). This is all in addition to the value of the Lake. Mr. Griswold estimated the value of the business to be $100,000 or more (295).

On the whole, it is submitted that the claimant has

made a showing which fully warrants a valuation of at least $140,000 upon the property appropriated by the government, which included the Lake itself and the land surrounding it upon which were the improvements referred to above.

The government offered no evidence as to the value of the said property.

CONCLUSION

It is respectfully submitted that the order herein prayed for should be granted.

FRANK S. BRIGHT,
Attorney for Appellant.

INDEX.

CASES CITED.

AUTHORITIES CITED.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

JOHN HORSTMAN COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 26

NATRON SODA COMPANY, APPELLANT,
v.
THE UNITED STATES. } No. 32

APPEALS FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

I.

STATEMENT OF FACTS.

These two cases, being similar in principle and arising out of substantially the same state of facts, were argued together in the Court of Claims and are therefore grouped as one case in the present brief. With some unimportant modifications which, with one exception hereinafter noted, do not affect the principle involved, the findings of fact in both cases by the Court of Claims are identical. Thus, the third, fourth, fifth, sixth, seventh, eighth, and tenth

findings are in identical language. The only important difference between the two cases arises in the ninth finding in the Natron Soda Company case, which discloses that if that Company had under other circumstances any claim against the Government, it had, through its predecessors in title, expressly waived it. This will be explained in detail presently.

The findings of fact, which are common to both cases, show that in the year 1906 the United States, under the authority of Acts of Congress, entered upon the construction of a great irrigating system, called the "Truckee-Carson Project," whereby it was sought to bring the waters of the Truckee River by canal to the Carson River, there impound them, and by means of lateral canals to irrigate a large section of arid land which it was contemplated would amount to two hundred thousand acres. These works were to be constructed in an arid area, known as the Carson Sink Valley, a depression in the earth's surface covering many thousands of acres and which was during a past geologic age the bottom of an inland sea, still called Lake Lahontan.

The drying up of this lake, through centuries of geologic change, modified the topography of the country, which was composed of sand, clay, silt, cinders, and other forms of disintegrated rock substance, and in places these changes had become solidified into stone or consolidated into compact, impervious areas of various sizes and shapes, called

playas. Fissures and cracks exist throughout the mass, but are not uniform. (Finding III.)

Through this large area the Carson River runs. About two miles from one point of the Carson River there are two volcanic craters forming an inverted conical depression, with a rim rising from eighty to one hundred feet above the floor of the valley, which was the bed of the dried up Lake Lahontan. The accumulation of water in these two dead craters caused little bodies of water, one of which was known as Big Soda Lake (owned by the Natron Soda Company, one of the appellants), and the other was called Little Soda Lake, which was owned by the other appellant, the John Horstmann Company.

The only known source of water supply for these bodies of water were small springs, which seeped into the lake and which were thus supplied by the seepage from the Carson River, which was about two miles from the soda lakes. (Findings III and V.)

In the construction of the irrigation system the United States constructed three canals, which passed "within two miles" of the two lakes. (Finding VII.) Upon the shores of these two lakes the two companies had constructed a plant for the extraction of soda from the waters, and these plants had been operated with profit for some years prior to the construction of the irrigation project.

Some months after the construction of the irrigation system an abnormal rise of water was noted in the above lakes. It steadily rose from 1906 to 1916,

and in that period the level had risen nineteen feet (Finding VIII), or an average of a little less than two feet a year. The result of this rise of the water was the flooding of the appellants' plants and the destruction of their business.

These are the basic facts in the controversy as found by the Court of Claims, and the important distinguishing feature, so far as the facts of the cases are concerned, between them is the one to which I have already referred. In the Natron Soda Company case, it appears that its predecessors in title had entered into an agreement with the Government to grant a right of way through their lands for the purpose of constructing a part of the said irrigating system. This contract recited:

> The first party, in consideration of the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described, agrees that the second party (the United States) may enter on, survey for, grade, and construct canals or ditches upon or across the lands of the first party.
>
> It is further agreed that in consideration of the premises the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works. (Finding IX.)

Pursuant to this contract, a deed was made for the right of way; but it did not contain the provisions above quoted.

Two other differences between the two cases remains to be noted.

The first is the apparent divergence in the nature of the respective claims as suggested in the two petitions.

In the Horstmann Company case the claim was apparently based upon the negligence of the Government in the construction of the irrigation plant, for it contained the following averment:

> That none of said canals and ditches of said irrigation project for carrying and which did carry said water, as aforesaid, and which surround said "Little Soda Lake," are lined by brick, cement, or other substance or material, but were made or constructed by merely digging out the earth, thereby forming a canal or ditch in the earth; that the water as it flows through the said canals or ditches seeps and percolates through the sides and bottom of said canals and ditches and through the adjoining soil to and into the said "Little Soda Lake," as the said "Little Soda Lake" is the lowest point and the point to which water would naturally flow underground from said canals and ditches by reason of the character of the seams or strata of the soil lying between the said canals and ditches and said "Little Soda Lake."

Paragraph XIV avers—

> that owing to the said porous condition of the soil in said canals and ditches, and generally in that vicinity, as aforesaid, *and the lack of proper lining in said canals and ditches, and*

> *owing to the way said canals and ditches were built,* and also to the natural condition existing as aforesaid, by reason of which water would flow from said canals and ditches to and into said "Little Soda Lake," the said water was permitted by the said United States Government and the said departments and officers thereof to and did seep and percolate through the said canals and ditches and through the seams or strata of clay and sand underlying the same into and on the said "Little Soda Lake."

This apparently based the claim of the Horstmann Company upon a tort; and if so, the plaintiff has put himself out of court, for the Court of Claims has no jurisdiction in cases arising out of tort, as the Government has never waived its immunity from suit in such cases.

In the Natron Soda Company case no such claim of negligence was made; but the claim was based upon a constructive "taking" by the Government of the appellants' plant for public purposes. In neither case is it suggested that the Government intentionally or consciously took the appellants' properties, respectively. The effect, if any, which the construction of the irrigation plant had upon the level of the waters of the two lakes was not contemplated, either by the Government's engineers or by the appellants. Nor was the gradual change in the level discovered by either party to the controversy for many months thereafter. The operations of the irrigation system, after some preliminary trials, were commenced in

August, 1906, and it was not until the spring of 1907 that the appellants discovered that from some cause the waters in their lakes, respectively, were rising.

In both cases the sole basis of the claim is the allegation that the construction of the irrigation plant did cause the rise in the water level of the two lakes and the consequent destruction of the appellants' plants. Unless that fact was established, the plaintiffs concededly have no case; for it is not pretended that the Government, either by express contract or by formal taking, or by any other implication, ever appropriated the appellants' property. As already stated, the nearest approach to the lakes of any of the Government canals was two miles.

The *second* difference between the two cases is that in the Horstmann case the plaintiff, despairing of any further attempt to induce the Court of Claims to find the basic cause of causal connection in his favor, is content to rest his case upon its negative finding that the real cause of the rise of waters in the soda lake is unknown and unknowable. This is as courageous as if a theatre manager were to put the play of Hamlet on the stage without the character of Hamlet in the *dramatis personae*.

In the Natron case, however, counsel recognizes the insufficiency of this negative finding and virtually seeks a new trial by asking this court to direct the court below to review its findings and include therein the ultimate and basic fact as to the real cause of the soda lake's rise in level. By his motion to remand he also seeks to reform the contract whereby his

predecessors in title expressly released the Government from any claim for damages by reason of the construction of the irrigation system.

Not content with this, he asks further findings as to the amount of damage that he claims to have sustained.

In his brief, he recited such portions of the testimony as he thinks supports the findings, which the Court of Claims, upon a consideration of *all* the testimony, refused to make; but it is obvious that as this testimony is not before this court it can not determine whether the Court of Claims was right or wrong in its findings of fact.

Counsel for the Natron Company says (p. 10):

> The first issue is: Was the destruction of the value of claimant's property caused by the Government? This is a clear issue of fact. If the injury was not caused by the Government, then, of course, there would be no liability.

Having thus stated the basic issue, he continues (pp. 10–11):

> An examination of the findings of fact as made by the Court of Claims will disclose immediately that there is no finding at all of the court upon the first and most essential question of fact, and without such finding, or a finding of all the circumstantial facts established in evidence bearing upon said question, the case can not be presented to this court.

Again he states (pp. 11–12):

> Yet, there is nothing whatever in the findings of the Court of Claims to show that this

> was caused by the works of the Government, and in fact finding (V) to which claimant has always strenuously objected and which is inconsistent with the other findings) gives the inference that there is nothing in the evidence to show that the rise of the water was caused by the Government work. The court states in this finding:
>
> "Percolating waters are hidden and invisible. It does not appear from the evidence how they are governed, or how they move under ground. The slope of the Carson Valley is in a northeasterly direction."

He therefore declines to produce Hamlet without the character of Hamlet.

I agree with the counsel for the Horstman Company that this court should not remand a case to the lower court with instructions to find a fact which that court was unable to find.

I also agree with counsel for the Natron Soda Company that the failure of the Court of Claims to find this basic fact is fatal to recovery.

The burden of proving such causal connection was upon the appellants, as plaintiffs in the court below, and it is their misfortune that they were unable to satisfy the Court of Claims that the United States Government, in the manner indicated, had caused the changes in the water levels of the two lakes. It is true that the court did not find affirmatively that the causal connection did not exist. Its decision was the Scotch verdict of "not proved." Obviously this failure to find the fundamental question of fact was

not an oversight, for after the first findings of fact were made applications were made for their amendment, and, while they were in unimportant respects amended, yet the court in its amended findings of fact still refused to find that the United States Government had caused the submersion of the appellants' property. Obviously, having regard to the volcanic nature of these crater lakes and the geological formation of the surroundng country, with its subterranean fissures and cracks and its porous soil, the court still concluded that, especially in a country of this character, the subterranean currents of water were like the ways of Providence, "mysterious and past finding out."

The opinion of the court delivered in the Natron Soda Company case, but which obviously represented the court's views with reference to the Horstmann Company case also, make this attitude of the court clear beyond doubt. The court said:

> Percolating water is a hidden, invisible thing. How it moves is more a matter of conjecture than knowledge—of inference rather than proof. It would seem impossible to apply any law, beyond the general principle of reasonable use of one's land, to such a hidden and formless thing. (Weil on Water Rights, vol. 2, p. 1093.) It seems, therefore, that the existence, origin, movement, and course of underground waters, and the causes which govern and direct their movements, are so secret, occult, and concealed that an attempt to administer any set of legal rules in respect

> to them would be involved in hopeless uncertainty, and would be practically impossible, because any such recognition of correlative rights would interfere to the material detriment of the Commonwealth with drainage and agriculture, mining, the construction of highways and railroads, with sanitary regulations, building and general progress of improvement in works of embellishment and utility. (Angell on Watercourses, 7th Edition, 171.)
>
> It seems to us that while the property of the plaintiff *may* have been destroyed by the irrigation system of the Government, yet the influences which have brought about this destruction are so secret, changeable, and uncontrollable that we can not subject them to the regulations of law, nor build upon them a system of rules as has been done with streams upon the surface; so that *if* the plaintiff has incurred a loss from the movement of these underground waters in this valley it is *damnum absque injuria.*

In the court below, in the Horstmann Company case, no further attempt was made to induce the court to change its findings of fact, but in the Natron Soda Company case the appellant, fully realizing that it had failed to establish its fundamental averment of fact, again urged the court to amend the findings of fact—

> (1) So as to show the ultimate facts as to the cause of the rise of water in Big Soda Lake and the inundation of the adjacent land which resulted in the destruction of the

plaintiff's property, or (2) by setting forth what the plaintiff asserts are "the circumstantial facts" shown in the evidence as to the cause of the rise of water in Big Soda Lake and as to the value of the property of the plaintiff.

In denying this motion, the court replied:

> In the case at bar the court has found the facts as they are established by the evidence, and has included in its findings all the facts *established by the evidence which "have been proven and which are material to the due presentation of the case of the plaintiff."* It will not be asserted that under rule 5 quoted above the plaintiff or defendant can of right have included in the findings of fact evidence of facts which he may assert to be facts established by the evidence. In other words, the rule can not be construed to mean that this court must include in its findings any evidence which the parties may ask to have included therein upon the mere statement that such evidence is a fact proven. This court in the last analysis must determine what are the ultimate facts which the evidence establishes. (*McClure* v. *United States*, supra.) If it was left to the parties to say what the findings of the court must include it is obvious that the findings of the court would no longer contain facts established by the evidence in the nature of a special verdict, but would be made up of all the evidence in the case and would impose upon the appellate court all the functions of a jury.

In concluding the opinion, the court again said:

> This court has found those ultimate facts and has put into the record every fact which the plaintiff has proved and which is material to the due presentation of its case.

As it can not be contended that the fact of the causal connection between the construction of the irrigation system and the overflow of the Soda Lakes was not material to the appellant's case, it is obvious that the court, in denying the motion to amend their pleading, again expressed the opinion that the appellants had not proved as a fact such causal connection, and that in the absence of such proof, the court was powerless to make such a finding.

I recognize that, in the three cases cited by counsel for the Natron Soda Company in his brief (p. 12), this court has, in exceptional circumstances, remanded a case to the Court of Claims to make a specific finding; but in none of those cases was the finding the ultimate issue of fact, and in none of them did the Court of Claims indicate that, in its judgment, no satisfactory proof had been offered of the existence of the fact by the party upon whom was the burden of proof.

Thus, in *United States* v. *Adams* (9 Wall. 661), the Government was suing to recover certain moneys. A question arose whether a certain formality had been observed, and the Court of Claims apparently deemed it immaterial. Subsequently, the Supreme Court decided that it was material, and thereupon the Supreme Court remanded the case for a specific

finding of a fact which had been ignored through a mistaken interpretation of the law.

In *United States* v. *Pugh* (99 U. S. 265) no motion to remand appears to have been made, and the court simply decided that, where the Court of Claims has found all the facts, the ultimate *legal* effect of those facts was a legal question, and therefore open for review on appeal.

In the third case, *Ripley* v. *United States* (220 U. S. 491), the plaintiff had sued the United States for a breach of contract, and the ultimate fact was whether the Government had broken the contract. Incidentally, there was an issue of fact as to whether the Government inspector had acted in good faith, and the real question was whether a certain finding by the Court of Claims found affirmatively or negatively this issue of fact. This court held that, as the language of the Court of Claims was so ambiguous as to be consistent either with the inspector's good or bad faith, the case should be remanded. The good faith or bad faith of the Government inspector, while a material element in the case, was not the ultimate fact, and the case was remanded because the Court of Claims had apparently preferred to evade the question by resorting to equivocal language which would justify either construction.

These are the only cases which the industry of opposing counsel has found to establish the right to remand; and it is apparent that they differ widely from the instant case.

In the case at bar, the ultimate fact and the very foundation of the plaintiff's claim was that the Government, by constructing the irrigation project, had caused the submergence of plaintiff's soda plant. The burden of proving this was manifestly on the plaintiff. The plaintiff offered all the testimony in support of the affirmative that he could, and, on the argument and reargument, insisted that the Court of Claims find as a fact what was the cause of the rise in water in these soda lakes. The Court of Claims, having considered all the testimony and without in any sense ignoring so obvious an issue of fact, confessed its inability to determine what was the cause, and contented itself with a finding that the cause was unknown and unknowable. This being the case, the court could not find the negative fact that the Government's irrigation project did not cause the injury complained of; nor could it find the affirmative fact that it did.

In effect, the court said: "We do not know what caused the change in the level of the lakes," and this is the best conclusion, after the most elaborate argument and the most patient consideration of the conflicting testimony, that it could reach.

Clearly, therefore, it would be nugatory to remand this case to the Court of Claims, with instructions to find an alleged fact which that court has twice declared its inability to find, either affirmatively or negatively.

If this case should be remanded, and assuming—as is wholly probable—that the Court of Claims would

not change its mind with respect to the probative force of the testimony, it could only reply, as in effect it has already done, that the plaintiff has failed to establish the ultimate fact that the construction of the irrigation project caused, by the seepage, the rise in the level of the lakes, and that it did not know what had taken place in the subterranean depths of this volcanic region.

If the Court of Claims should find that, after an examination of all the scientific testimony, it was ignorant as to the true cause of the periodic volcanic eruptions of Mount Vesuvius, would this court attempt to compel it to assume knowledge where it found itself unable to have knowledge?

II.

NATRON SODA COMPANY'S MOTION TO REMAND.

So fatal to the appellants' case is their failure to establish that the construction of the irrigation system had any effect, direct or indirect, upon the rise of the water levels of the Soda Lakes that the counsel for the Natron Soda Company next makes an effort to induce this court to compel the Court of Claims to find a fact which it has already twice confessed its inability to find from the testimony. It would be idle to ask the lower court to find either that the construction of the irrigation system did cause the damage complained of, or that it did not; for the court has already deliberately concluded and reaffirmed its conclusion, after due con-

sideration of all the testimony, that the operation of subterranean currents is not susceptible of proof, or at all events was not proved by the plaintiff below.

In this, it only followed a like conclusion of this court, which, in the case of *Kansas* v. *Colorado* (206 U. S., 46), said, at page 107:

> Indeed, the extent to which seepage operates in adding to the flow of a stream, or in distributing water through lands adjacent to those upon which water is poured, is something proof of which must necessarily be almost impossible. We may note the fact that a tract, bordering upon land which has been flooded, shows by its increasing vegetation that it has received in some way the benefit of water, and yet the amount of the water passing by seepage may never be definitely known. The underground movement of water will always be a problem of uncertainty.

The motion to remand in the Natron Soda Case is unusual and must be treated as a motion in the nature of *a motion for certiorari* to cause the lower court to make further findings on the theory of a diminution of the record.

This can not now be entertained for the following reasons:

(1) Rule 14, of the Rules of the Supreme Court, expressly provides that "*all motions for certiorari (for diminution of the record) must be made at the first term of the entry of the case; otherwise, the same will not*

be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay."

See also *Chappell* v. *United States* (160 U. S. 499, 506).

Both of the above cases were docketed at the October, 1919, term of the Supreme Court, the *Horstmann* case on January 14, 1920, and the *Natron Soda* case on February 12, 1920, and, unless counsel can show some satisfactory reason for the delay in presenting the motion, it will be denied.

(2) A motion to remand could not change the ultimate conclusion of the lower court as to the basic issue of fact. It could only bring up the evidence. The lower court in refusing to state the evidence has simply obeyed the rules of the Supreme Court which provide as follows:

> In all cases hereafter decided (after 1866) in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record *and none other*:
>
> 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.
>
> 2. A finding by the Court of Claims of the facts in the case, established by the evidence, in the nature of a special verdict, *but not the evidence establishing them;* and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree. The finding of facts and

conclusions of law to be certified to this court as a part of the record.

(3) The Supreme Court has declared that "the findings of the Court of Claims in an action at law determine all matters of fact precisely as the verdict of a jury" (*Stone* v. *United States*, 164 U. S. 380, 382; *Brothers* v. *United States*, 250 U. S. 88, 93), and it would seem inconsistent that the Supreme Court would go behind the findings of the Court of Claims in these cases, look at the evidence, and then determine that the latter court should have made different findings.

A motion to remand, therefore, would be a nullity. The Court of Claims has confessed its inability, upon the evidence, to determine the cause of the rise of the waters in the Soda Lakes, and this notwithstanding careful and able arguments and rearguments by appellants' counsel to induce the court to make such finding. In this it has only accepted the conclusion of this court in Kansas *v.* Colorado, *ante*, p. 17. If the failure of the Court of Claims to find the causal connection were an oversight—which is inconceivable—a motion to remand might be proper; but such a motion could only operate to require the lower court to guess where they have solemnly decided that it was impossible to guess.

This inability on their part to know the unknowable is easily understood. Granted that the reclamation project brought a large supply of additional water to the Carson River, it was thereupon conducted by the irrigation canals to a thousand different points

in an area of one hundred thousand acres and slowly percolated the soil. Its nearest point to the Soda Lakes was two miles, and it is obvious from the extent of the area that the furthermost point of possible contact was many miles. The region is volcanic in character, and what subterranean currents there may be, neither the eye nor the knowledge of man has yet revealed. Possibly some new geologic change has taken place, which may account for the rise of the waters, or if seepage from the nearest canal accounts in part for the rise of water, who can say what other hidden streams have contributed? Obviously, the change in the water level of the Soda Lakes may be due either to—

(1) seepage from the Carson River, or

(2) from the canals of the Truckee-Carson project, or

(3) from the irrigated lands of the Truckee-Carson project, or

(4) from other sources or conditions, of which we know nothing.

Any or all of these may have caused the rise in the subterranean ground-water plane. The burden was upon the plaintiffs below to prove the cause, and they have no right to demand that the Government or any of its courts shall guess at the cause.

III.

ARGUMENT.

Let us assume, however, that we are wrong in our previous contentions, and that this court is prepared

either itself to draw an inference as to the true cause of the damage, or that, on further proceedings, the Court of Claims had found affirmatively that the seepage from the Government's canals had caused the damage in question.

Would it follow that the appellants could recover? No pretense is made of any express contractual liability by the Government. It never intentionally caused the damage, nor did it in any manner agree to compensate the plaintiffs for such damage. A contractual liability, therefore, in the strict sense of the term, is not and could not be suggested.

Still less could the plaintiffs recover under the theory of a tort, for three obvious reasons. In the first place, the court has affirmatively found in both cases that the Government was not negligent. In both cases there is the express finding that "No negligence on the part of the defendants is alleged or proven in the construction or operation of the canals of the project." (Horstmann Company case, Finding X; Natron Soda Company case, Finding XI.)

We have already shown that as to the Horstmann Company case the pleadings show that there was an averment that the irrigation works had not been properly constructed (*ante*, pp. 5–6); but this theory, if not now disclaimed, has been negatived by the Court of Claims. We have, therefore, a case wherein the Government, for a great public purpose, to benefit thousands of people, at its own expense constructs a public improvement in a careful and workmanlike manner. Nothing that it could do to prevent this or any damage was left undone.

Secondly, even if this court could conclude, in the teeth of this finding, that the construction of this irrigation plant, with its alleged consequences to the plaintiffs, was a tortious misuse of Government property, the conclusion would still remain that no suit could be maintained, as the Government has never given consent to such a suit and has expressly withheld from the Court of Claims any jurisdiction to entertain a case which is based upon an allegation of a tort.

The only remaining theory—and it is the one upon which the appellants will rely—is that the careful and skillful construction by the Government of its irrigating system was a constructive "taking" of the plaintiffs' property, and therefore the Government impliedly contracted to compensate the plaintiffs for their property thus appropriated.

In considering this question, three things must be remembered:

(1) That the alleged results of the Government's acts were, at the time the acts were done, unknown and unknowable.

There was therefore no conscious and deliberate appropriation of appellants' property.

(2) That the Government's acts were done at a distance from the appellants' property, which was, at its nearest, two miles away, and, at its farthest point, many miles more.

(3) That if the operation of the Government's plant injured the appellants' property, it was not immediate, and, as such, readily perceived, but that

it was so slow and gradual that it was not until nearly nine months later that either the Government or the appellants could see what is alleged to have happened.

Under these circumstances, can it be said that, under any decision of this court, there has been such a conscious and intentional "taking" of appellants' property as to imply a contract on the part of the Government, first, to appropriate plaintiffs' property, and then to compensate them for it?

This court has gone far in depriving the Government of its immunity from suits sounding in tort under the theory of an implied "taking," but it has never yet said that the Government could, in a constitutional sense, be said to have taken property where it was not only not conscious of such taking but, in the nature of the case, could not have been conscious at the time the acts were done.

IV.

THE AUTHORITIES.

The chief reliance of the appellants is upon the case of *United States* v. *Lynah*, decided in February, 1903 (188 U. S. 445). In this famous case the court, divided four to three, held that where the Government constructed an embankment along the Mississippi, whose *direct, certain, immediate, and necessary effect* was to cause an overflow upon the lands of the plaintiff in that case, there was a "taking" within the fifth amendment of the Constitution.

I accept the decision in that case and am not seeking that its doctrine should be modified, except in so far as this court itself in later cases restricted its application to similar facts. Unquestionably the Government may manifest its purpose to appropriate property by its acts, as well as by its words. For example, if the Government desired to tear down a building and it was obviously necessary to use the adjoining land for the *débris*, it would not matter whether the Government first appropriated the adjoining land by formal proceedings, and then tore down its building, or whether it first tore down its building and covered the adjoining land with the *débris*. In either case the formal verbal avowal of an intention to appropriate, or the direct appropriation by the necessary results of unequivocal acts, amounts to the same thing. It was obvious that in the Lynah case, the *direct, certain, immediate, and necessary result* of the construction of the embankment was the overflow of Lynah's land. And, from the essential nature of the act, this court drew the reasonable inference that the Government intended to overflow Lynah's lands, and thus to appropriate them. There was a direct connection between the Government's operations and the claimant's lands, both with respect to space and time.

In the cases at bar, however, all these elements are absent. It cannot be said that, when the Government undertook to construct this irrigation plant, the overflow of plaintiffs' works was so direct, immediate, and inevitable as to suggest a conscious

and deliberate appropriation by the Government. In a word, the distinction which must exist between these cases of a true "taking," on the one hand, and the indirect and unascertainable consequences of a lawful act on the other must lie in an intention to take, whether that intention be expressed or implied.

There must be an intention on the part of the United States, either expressed or implied, to take the property of another before there can be any implied promise to pay or contract liability incurred. This liability may be inferred where the results naturally and indubitably flow from the act or effect of the act and may be definitely ascertained or determined. In this case it was impossible for the United States engineers who laid out this irrigation project to have ascertained or determined what effect the irrigation of these lands would have upon the waters of Big and Little Soda Lakes. What part of this water brought in by the irrigation project, if any, would find its way into the lakes was impossible to determine. This being true, the effect was impossible to ascertain, there clearly being no intention on the part of the United States to take the property of the plaintiff, there would be no implied promise to pay for the same. This proposition is very clearly stated in the opinion written by Judge Downey in the Stockton Flood cases, No. 32914 (p. 26):

> The intention, of course, need not be expressed. It may also be a matter of implication, but it must be fairly inferable from all the circumstances. The inference may be

> justified when the taking by an overflow is the natural, known, or easily to be ascertained result of the governmental enterprise. As in the case of a dam across a stream erected to create a pool above, the land, if any, which will be overflowed thereby is easily and accurately to be ascertained, and before, by modern engineering methods, as easily as after the erection of the dam, and such a certain, known, or easily ascertained result can be presumed to have been intended; but eliminate such conditions and substitute an entirely unanticipated result of an authorized Government work, a result not susceptible of advance ascertainment, and perhaps due also to abnormal and unanticipated conditions, and there is no room for an implication of intention. And if the implied contract must arise out of the intention, express or implied, to take, coupled with Constitutional obligation to pay, it must fail for want of an essential element.

This opinion also cites the case of *Tempel* v. *United States*, 248 U. S. 121. The United States, in aid of navigation, had done dredging in the North Branch of the Chicago River in what was supposed to be the natural bed of the river, or at least by dedication or in some other manner a part thereof, but where in fact the stream had been widened by the plaintiff's lessee, for his own purposes, by the dredging out of a part of plaintiff's lands and submerging it to a considerable depth. The Government in prosecuting its work had no knowledge that it was dredging plain-

tiff's land. Plaintiff first demanded possession of that part of the submerged land which had formerly constituted a part of his upland, and this demand being refused he instituted a suit to recover the value of that which he claimed had been taken by the Government. Here there was a direct invasion of the land in question, and the intention was, of course, to do the very physical thing that was done, but the court said, "If the plaintiff can recover, it must be upon an implied contract," and, holding it unnecessary to determine whether or not the Government's claim of a property right in it was well founded, it said:

> The mere fact that the Government then claimed and now claims title in itself and that it denies title in the plaintiff prevents the court from assuming jurisdiction of the controversy. The law can not imply a promise by the Government to pay for a right over, or interest in, land, which right or interest the Government claimed and claims it possessed before it utilized the same. If the Government's claim is unfounded, a property right of plaintiff was violated; but the cause of action therefor, if any, is one sounding in tort, and for such the Tucker Act affords no remedy. (Citing *Hill* v. *United States*, 149 U. S. 593.)

And in concluding the opinion the learned justice says:

> The facts preclude implying a promise to pay. If the Government is wrong in its contention, it has committed a tort.

In this case, as the effect of the irrigation project on the waters of Big and Little Soda Lakes was impossible of determination, there could not have possibly been any intention to take, and therefore there being no intent on the part of the Government to take the plaintiff's property no implied promise to pay for the same could possibly arise.

This same principle was followed in the case of *Alfred J. Bothwell and the Bothwell Company, a corporation, appellants*, v. *United States* (254 U. S. 231). Appellants owned a tract of land lying in the Sweetwater Valley, Wyoming, and were engaged in the business of cattle raising. The United States constructed the Pathfinder Dam under the Reclamation Act of June 17, 1920. This arrested the flood waters and caused an inundation of the lands. The hay was destroyed and it became necessary to remove the animals and sell them at prices below fair value. The value of the land was ascertained and paid but the court denied appellants' claim for losses consequent upon the forced sale of the cattle and destruction of the business. No appeal was taken. The present suit was instituted to recover for the items so disallowed. The court below gave judgment for the value of the hay only and the cause is here upon plaintiff's appeal. The court said:

> In the circumstances supposed there might have been a recovery "for what actually has been taken, upon the principle that the Government by the very act of taking impliedly has promised to make compensation because the dictates of justice and terms of the fifth

amendment so require." (*United States* v. *Cress*, 243 U. S. 316, 329.) But nothing could have been recovered for destruction of business or loss sustained through enforced sale of cattle. There was no actual taking of these things by the United States, and consequently no basis for an implied promise to make compensation.

The decision of this court in *United States* v. *Lynah* caused consternation in Government circles; for it seemed to constitute a serious barrier to the construction of great public improvements. For this reason, it should not be extended beyond its reasonable scope. An extension of the rule could only operate to deprive the Government of its immunity from suits sounding in tort; for it would mean that, to the extent that any public improvement, whether carefully or negligently constructed, caused indirect and remote damage, the property thus damaged was "taken" for public use, a proposition which would be obviously absurd.

And yet the decision in the Lynah case did encourage many such claims against the Government; but in all such cases the claimants found that this court was indisposed to extend the doctrine of the Lynah case and would restrict it to cases where the Government so immediately, directly, and indubitably destroyed the works of a citizen as to result in a true "taking" of his property.

It seems enough to refer to some of the later cases that were held similar in their facts.

Take, for example, the case of *Bedford* v. *United States*, 192 U. S. 217, which was decided about eleven months after the Lynah case, and in which this court reviewed its former decision. In that case, the Government had constructed certain revetments along the banks of the Mississippi, in order to prevent the erosion of the banks by the waters, near the city of Vicksburg. The construction of these revetments caused a change in the course of the river, which in turn resulted in the overflow of a riparian owner, who thereupon sued and invoked the doctrine of the Lynah case. This court, however, held that there was no taking, and that the plaintiff was without a remedy. It held that the Government could not be prevented or embarrassed in protecting one riparian owner because the nature of its work might cause such change in the river as to injure another riparian owner. In all such cases, the Government, under its power over the navigable rivers of the nation, had a right to determine what was due to the interests of all riparian owners and to the public in general.

So, too, in the case of *Jackson* v. *United States*, 230 U. S. 1, where the United States Government constructed a system of public works for the purpose of so confining the waters of the Mississippi River between lines of embankments of levees, as to give increased elevation and velocity and force to the current, in order to scour and deepen the channel. This was alleged to have caused an increased and abnormal elevation of at least four feet to the waters of the river at the high water or flood stage, and to cause the

waters to back up and overflow the lands of the plaintiffs and to destroy their crops and to render their lands unfit for cultivation. In this case, the court said, at page 23:

> It is to be observed that even if all the previous considerations which we have stated concerning the nonliability to result from building levees, measured by the right of an individual to build a levee to prevent the water of a river from overflowing its banks and destroying his property, be put out of view, and the case therefore in all its aspects be tested by the scope of the governmental authority possessed by the United States, the absence of merit in all the claims is too clear to require anything but statement. We say this because the plenary power of the United States to legislate for the benefit of navigation and to construct such works as are appropriate to that end, without liability, for remote or consequential damages, has been so often decided as to cause the subject not to be open.

These cases, where the Government acts as a common protector of all rights, are very much in point in the cases at bar. Here was a vast stretch of arid land that was of no use to anyone. If it could be reclaimed, it could be made a source of great wealth to those who would cultivate it and to the world which would enjoy its products. Thus, countless thousands were to be benefited by the public spirit of the Government in furnishing the money to bring water to a vast area of two hundred thousand acres, which, without such water was an arid desert, and

with it, a bountiful garden. If the Government, in undertaking this important, public-spirited work, were obliged to compensate every one who might in some indirect and unascertainable way sustain some damage, it may be questioned whether the reclamation project would ever have been undertaken. Whose rights were to be considered? Those of thousands who sought arable land, or the few who might suffer? Once again, as in the case of the Mississippi River, the Government, as the common protector of all, was justified in doing that which was for the greatest good of the greatest number, and in doing so, it ought not to be penalized.

Plaintiffs had no vested right in the maintenance of the existing water table in the Carson Valley as of 1906. There seems to be no question as to the right of the Government to build and operate this irrigation project, and also that the Government would not incur any greater liability on account of seepage from canal than would an individual or corporation. If this land had been owned by a corporation and the corporation had constructed this irrigation project instead of the Government and the same results followed, would the plaintiff in this case have had a cause of action against the corporation? The Government certainly does not incur any greater liability than an individual or corporation for the same acts, and it can hardly be contended that the plaintiffs had such a right in the waters of Big and Little Soda Lakes as to stop the march of civiliza-

tion and development of this vast area. See *Jackson* v. *United States*, 230 U. S. 1, 20.

It certainly can not be contended that the development of this vast area should be perpetually held up in order that the density of the solution of soda found in the waters of these lakes might not be lessened, or the level of the water in the lakes raised.

V.

The Government has no greater liability for consequences due to the construction of its works than an individual would have who constructed similar works. Indeed, it is less; for an individual is not immune from suit if such construction tortiously injures the property of another, whereas the Government has such immunity.

If a private corporation had constructed and maintained these canals under the Carson-Truckee project, and this private corporation had been the defendant in these cases, it would not have been liable to the claimants; therefore the Government is not liable, as the fifth amendment to the Constitution was not designed to place a burden on the Government not resting on private corporations under the same circumstances.

In *Gould on Waters* (3d ed., sec. 298) it is stated:

> A person may lawfully collect water by means of a dam, or in ditches, canals, culverts or pipes, and is not liable in such a case for injuries caused by the escape of water in the absence of negligence on his own part.

In support of this doctrine many cases are cited directly in point.

In *Kinney on Irrigation and Water Rights* (Vol. III, p. 3080) the following appears:

> The owners of an irrigation canal or ditch are not liable as insurers for injuries sustained to adjoining property by seepage, leakage, or overflow from the canal or ditch, but are only liable for such injuries in case of actual negligence.

Numerous cases are cited in support of the doctrine.

In *Wiel on Water Rights in the Western States* (3d ed., p. 489) we find:

> The use by means of ditches, flumes, and similar apparatus is, of course, the most usual, and using the water in this way does not, by any means, make the appropriator an insurer of others against damage from breaking, overflow, seepage, or other escape of the water. The famous English case of *Rylands* v. *Fletcher* declared that a man builds a reservoir, or other works to hold water, at his peril. *But such is not the law in the West* The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence. Negligence must be shown. [Italics ours.]
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> *Fleming* v. *Lockwood*, 36 Mont. 384, 14 L. R. A. (N. S.) 628;
>
> *Jos. M. Howell* v. *Big Horn Basin Colonization Company*, 14 Wyo. 14, 1 L. R. A. (N. S.) 596;

King v. *Miles City Iron Ditch Company*, 16 Mont. 463, 41 Pac. 431;

Burt v. *Farmers' Coop. Irr. Co.* (Idaho, 1917) 168 Pac. 1078;

Wolf v. *St. Louis Independent Water Co.*, 10 Cal. 541;

Everett et al. v. *The Hydraulic Flume Tunnel Co.*, 23 Cal. 225;

Campbell v. *Bear River, etc., Co.*, 35 Cal. 679.

In Colorado, one of our States where irrigation by canals is employed extensively, a statute is in force which requires ditch companies "to keep their ditches in good condition so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property."

The court, citing this statute in *North Sterling Irrigation District* v. *Dickman*, 59 Colo. 169, 149 Pac. 97, held that "the owner of a ditch is not liable for damages as the result of water seeping therefrom unless it appears that such seepage was caused by the negligent construction or operation of the ditch."

See also:

Bridgford v. *Colo. Fuel & Iron Co.* (Colo. 1917) 167 Pac. 963.

The North Sterling Irr. Dist. v. *Gehrig*, 27 Colo. App. 551.

As was aptly said in *Middelkamp* v. *Bessemer Irr. Co.* 46 Colo. 102, 115, 103 Pac. 280, where plaintiff, as in the cases at bar, sought to hold a canal company liable for damages for seepage from its canal:

> We do not think it was the intention of the framers of our Constitution to place such an

> extraordinary burden upon a class of enterprises so vital to the future development and prosperity of our State; for by reason of conditions existing in this arid region the construction of irrigation canals was always deemed of paramount importance.

In a note to the case of *Brennan Construction Co.* v. *Cumberland* (29 App. D. C. 554), reported in 15 L. R. A. (N. S.) 535, 541, the following summary is given:

> The doctrine of *Rylands* v. *Fletcher* has been applied in one case in each of the following States: Ohio, Texas, California, Illinois, and New York, but the contrary was held in other cases in Texas and in a case in the Supreme Court of Illinois, and the weight of authority in California and New York is that the defendant is not liable in the absence of negligence. This latter rule appears to accord with the American rule on the subject in regard to damages caused by water escaping from defendant's premises or pipes.

And this appears on the following page (542):

> The weight of authority in this country is that the defendant maintaining a water ditch or tank, or operating and using water pipes, will not be liable for damages caused to others from the escape of the water from his premises in the absence of negligence.

Is the United States, when it enters upon great public improvements for the common benefit of all the people, in a worse position than a private corporation or citizen?

This court has answered the question in *Bedford* v. *U. S.*, 192 U. S. 217, 223:

> Is only the Government so restrained? Why not as well riparian proprietors; are they also forbidden to resist natural causes, whatever devastation by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the Government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. * * * Conceding the power of the Government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility.

The same idea was expressed in *Jackson* v. *U. S.*, 230 U. S. 1, 21–22:

> Would it be said that the claimants would have a resulting right of action in damages because other owners had exerted the very right which the claimants had previously resorted to for the purpose of protecting their own land? If not, upon what imaginary ground can it be said that because a work which was lawful in and of itself was done by the United States, therefore responsibility in favor of the claimants was entailed?

VI.

Claimants had no vested right in the soda accretions from the ground waters of that vast section, nor in the maintenance of a certain density of the water entering the lakes, nor in the maintenance of the then existing ground-water level in the valley where the lakes are located.

The testimony shows that the soda obtained from the Soda Lakes was derived from accretions of the underground waters of that section. (26, 55, 751; Russell's Monograph, p. 75; Deft's Ex. Clark No. 6.)

Lyons v. *U. S.*, 26 Ct. Cls. 31, 45, is a case where claimant asks damages because the work of the Government in Rock Creek Park caused the water in the stream to flow by claimant's land more rapidly, and the sands which had theretofore been deposited on his land were carried past. He had been deriving a steady income from this sand, just as claimants allege they have been deriving from the soda in the lakes. The augmented waters in each case disturbed the supply. This court in the Lyons case aptly said:

> We are of the opinion that the use by the Government of the stream does not injure plaintiff in any tangible property right.

This case was quoted from at length in *Cohen* v. *U. S.*, 162 Fed. 364, 371, where the court held that a claimant had no vested right in the gravel which the Government work in a stream had prevented thereafter washing down on claimant's land.

And, of course, claimants, in the case at bar, had no vested right in the maintenance of the then existing ground-water level of that vast area, nor in the maintenance of any particular density of any solution of soda which might have been entering the lakes.

As the rights of riparian proprietors are subject to the legitimate development of the stream, so is the right of claimants to their soda manufacture subject to the legitimate development of that great valley.

VII.

One remaining point is left for discussion. If this court fail to sustain my contentions as hereinbefore advanced, yet, in the case of the Natron Soda Company, it would nevertheless be obliged to sustain the decision of the Court of Claims, for the very obvious and as it seems to me inescapable reason that the plaintiff in that case, through its predecessors in title, consented to the acts of the Government for which it now claims, and indeed expressly released the Government "from all claims for damages for entry, survey, or construction of such works."

The plaintiff having consented to the construction of the canals and granted the defendants a right of way through his lands for the construction of the canal is estopped from any right of a recovery in the absence of negligence. This was a voluntary act on the part of the plaintiff and he can not recover for the loss of other property which may have been damaged by the construction of the work to which he agreed.

In *Daniels* v. *St. Francis Levee District*, 84 Ark. 333, 105 S. W. 578, plaintiff sought to recover damages for seepage on his land from defendant's levee. The plaintiff, however, had granted to defendant a right of way through his land for the construction of the levee. The court held that a landowner who consents to the construction of a levee and grants a right of way over his land for that purpose cannot complain of any damage to the land resulting from the construction and maintenance of the leveein a skillful manner. Any damage resulting therefrom being presumed to have been compensated for by the consideration paid for the conveyance, and quoting from another case, the court said:

> No man can maintain an action for a wrong where he has consented to the act which occasions his loss. * * * The execution of the conveyance placed the parties in the same relative situation, and gave to each precisely the same rights as if the railroad company had caused the land to be condemned for the right-of-way and had paid the award of damages. In either case the company is authorized to do whatever is lawful in the construction and management of its road; and the owner's claim for injury to the rest of his land is released, except as it arises from faulty construction.

In Lewis on Eminent Domain (3rd Ed.), section 474, we find:

> The conveyance of land for a public purpose will ordinarily vest in the grantee the same

> rights as though the land had been acquired by condemnation. The conveyance will be held to be a release of all damages which would be presumed to be included in the award of damages if the property had been condemned. The grantor therefore can not recover for any damages to the remainder of his land which result from a proper construction, use and operation of works upon the property conveyed.

See also *Wallace* v. *Columbia, etc., R. R. Co.*, 34 S. C. 62, where plaintiff granted the defendant a right of way over his land and the defendant erected an embankment which obstructed a stream, causing it to flood plaintiff's property, the court held the defendant was not liable, as there was no showing of negligence presented.

In *Nunnamaker* v. *Water Power Company*, 47 S. C. 485, 25 S. E. 75, where plaintiff had granted defendant the right to flood some land and the balance was damaged, the court said (p. 487):

> It would be unreasonable to hold that a voluntary grant of a right of way is not as effectual to protect the grantee from suit for damages arising from its proper use, as a right of way taken under compulsory proceedings. *This which is settled law as to railroads applies on principle to canals as well.* * * * The plaintiff, having seen fit to grant license to permanently flood a part of his tract of land for the maintenance of the canal, is presumed to have taken into consideration the damage to the residue of his tract, which would accrue

> to him from the proper and reasonable use of the right granted. If for such use he did not get adequate compensation in the price paid for the grant or license, and greater injury than he contemplated has resulted from such reasonable use, it is damnum absque injuria.

If, therefore, the predecessors in title of the Natron Soda Company had only deeded the right of way to the Government for the construction of its canal, without more, it would have acquiesced; and there can be no implied contract to compensate for the alleged "taking." But they did more. They expressly released the Government from any such claim for damages as then successor in title is now making. In the motion to remand, it is claimed that the agreement was without consideration, but the contract especially provides that the release was made "in consideration of the benefits to be hereafter derived from the construction of irrigation works through or in the vicinity of the lands hereinafter described." (*Ante*, p. 4.) *How, then, can it be regarded as a nudum pactum?*

Respectfully submitted.

JAMES M. BECK,
Solicitor General.

SEPTEMBER, 1921.

○

SUPREME COURT OF THE UNITED STATES.

Nos. 26 and 32.—October Term, 1921.

John Horstmann Company, Appellant, 26 *vs.* The United States.		
		Appeals from the Court of Claims.
Natron Soda Company, Appellant, 32 *vs.* The United States.		

[November 21, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

Actions in the Court of Claims to recover respectively the sums of $35,000 and $170,000 alleged values of certain properties charged to have been taken and appropriated by the United States.

Both appellants are corporations, and are respectively owners of lands in Churchhill County, State of Nevada, surrounding and including lakes known as Little Soda Lake and Big Soda Lake. The Horstmann Company is owner of the former and the Natron Soda Company is owner of the latter.

In 1906 each appellant was manufacturing soda from the waters of the respective lakes and the controversy of the cases turns upon the condition of the lakes at that time, and their condition after an irrigation project was instituted by the Government, called the Truckee Carson Project.

The lakes are situated in an area known as the Carson Sink Valley, and in 1906 were dry bodies, and the source of soda supply to the respective appellants.

From prior to 1867 to 1906 the levels of the lakes had not varied more than 2 feet. In 1906 the United States Reclamation Service acting under the authority of acts of Congress constructed the Truckee Carson Project consisting of dams, canals, and other structures whereby through the usual means large quantities of surface waters theretofore confined to the watershed of the

Truckee River were in 1906 and during each year since then transported to the watershed of the Carson River and distributed to various and sundry tracts of land in the Carson River Valley for irrigation purposes.

Details of the project need not be given but with its advent the body of the ground water in the entire section covered by the project rose, and the volume of water in the lakes has continually increased, and the level of the lakes has risen about 19 vertical feet during the period of 1906 to 1916, in consequence of which the value of the properties of appellants have been destroyed, that of the Horstman Company being $9,000 and that of the Natron Company being $45,000, according to the findings of the Court of Claims.

There have been additions to the canal project and its ultimate development contemplates the reclamation of 206,000 acres of land. At present the canals of the project ramify an area of 100,000 acres.

No negligence on the part of the United States is alleged or proven.

The conclusion of the Court was that appellants were not entitled to recover, hence it dismissed the actions and rendered judgments against appellants for costs of printing the records. Motions for new trials were made and denied.

The question of the jurisdiction of the Court of Claims of the actions is intimated, if not urged, based on the allegation in the petition of the Horstman Company that owing to the porous condition of the soil in the canals and ditches and "the lack of proper lining in said canals and ditches, and owing to the way said canals and ditches were built and to the natural condition existing" the water flowed into the lake and seeped and percolated through the canals and ditches.*

The Government is cautious in its characterization of this allegation and says that it "apparently based the claim of the Horstmann Company upon the tort" and adds if the claim be so based, the Court of Claims had no jurisdiction "as the Government has never waived its immunity from suit in such cases."

*The petition of the Natron Soda Company directly alleges that the acts of the Government were legally done in the exercise of a constitutional and legal power.

We do not think, however, that the allegation was intended as an accusation of negligence but rather to forestall a defense, based on the character of the works that from them there could be no causal connection between the project of the Government and the rise of waters in the lakes. The Court of Claims besides explicitly found that there was no negligence.

Upon the merits, the contention of the Government is the absence of such causal connection between its works and the injury to the properties of appellants. It concedes, however, that the contention is a deduction from obscure findings, the Court not finding affirmatively that a causal connection did not exist. "Its decision was the Scotch verdict of 'not proved' ", to quote counsel.

Appellants oppose the Government's contention and deductions, oppose to them the difference in conditions before and after the execution of the canal project, and their reasoning seems to have the support of the methods that the world employs in the investigation of its phenomena and instances.

Post hoc, therefore, *propter hoc* may not be confidently asserted but there is a suggestion of effect and cause in it, of sequence, something more than unrelated occurrence. And of this there seems to be pertinent application in the present case. The transfer of water from one watershed to another—from the Truckee River watershed to the Carson River watershed—accompanied by an increase of the water in the lakes from a level not varied in 29 years more than 2 feet to 19 vertical feet would seem to demonstrate this as an effect of the canal project. And there can be no doubt of the adequacy of the cause even though, to quote from the findings, "percolating waters are hidden and invisible" and that "It does not appear from the evidence how they are governed or how they move underground." Their effects above ground, a rise of water in the lakes from 2 feet to 19 feet of water, are certainly visible and unmistakable. Indeed, the Court explicitly found that with the advent of the irrigation project the body of ground water in the entire section covered by the project rose.

However, we need not arbitrate the contentions but will assume with appellants that there was causal connection between the work of the Government and the rise of waters in the lakes, and the consequent destruction of the properties of appellants, but it does not follow that the Government is under obligation to pay therefor, as for the taking of the properties.

The Court of Claims, as we have seen, decided against such obligation and to its reasoning it would be difficult to add anything. The reasoning of the Court is attacked, however, by appellants, and *United States* v. *Lynah,* 188 U. S. 445, is adduced against it.

The instance of the cited case and a certain generality in its reasoning and basic principle gives plausible support to the contention. It is declared that the rule deducible from prior cases which are reviewed, is that the appropriation of property by the Government implies a contract to pay its value, and it is further declared that there need not be a physical taking, an absolute conversion of the property to the use of the public. It is clear from the authorities, it is said, that if by public works the value of the property of an individual is substantially destroyed, its value is taken within the scope of the Fifth Amendment. And it was decided that "the law will imply a promise to make the required compensation, where property to which the Government asserts no title is taken, pursuant to an Act of Congress, as private property to be applied for public use." *Tempel* v. *United States,* 248 U. S. 121, 129, 130.

This generality has had exception in subsequent cases. It is to be remembered that to bind the Government there must be implication of a contract to pay, but the circumstances may rebut that implication. In other words, what is done may be in the exercise of a right and the consequences only incidental, incurring no liability. *Bedford* v. *United States,* 192 U. S. 217; *Kansas* v. *Colorado,* 206 U. S. 46; *Tempel* v. *United States, supra.* And there is characterization of the *Lynah* case in *United States* v. *Cress,* 243 U. S. 316.

We think the cases at bar are within the latter decisions and it would border on the extreme to say that the Government intended a taking by that which no human knowledge could even predict. Any other conclusion would deter from useful enterprises on account of a dread of incurring unforeseen and immeasurable liability. This comment is of especial pertinence. The result of the Government's work to the properties of plaintiffs could not have been foreseen or foretold is a necessary deduction from the findings of the Court of Claims. The Court found that there is obscurity in the movement of percolating waters, and that there was no evidence to remove it in the present case, and necessarily there could not

have been foresight of their destination nor purpose to appropriate the properties.

In the Natron case the Company's predecessors in interest conveyed a right of way to the United States of certain lands of the Company, and prior to the conveyance, agreed with the United States that in consideration of the benefits to be derived from the construction of the works through the lands conveyed, that the United States might construct canals and ditches on and across the land, and further agreed "that in consideration of the premises, the first party hereby releases the second party from all claims for damages for entry, survey, or construction of said works."

The Government adduces the agreement and conveyance in opposition of the right of the Natron Soda Company to recover. The Company resists this effort. We, however, are not called upon to pass upon it. Independently of the agreement the Company's claim is to be rejected.

Judgments affirmed.

A true copy.

Test:

Clerk Supreme Court, U. S.